Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANTHONY D'ARIA,

Petitioner,

v.

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

-and-

UBS FINANCIAL SERVICES, INC., a corporation, UBS PAINE WEBBER, a corporation, PAINE WEBBER GROUP, INC., a corporation,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Unlike a traditional common fund class action settlement, in which attorney's fees are paid out of the common fund available to the class (and any reduction in fees correspondingly increases the class recovery), the proposed class action settlement in this case includes a *reversionary fee structure* which provides that if the court reduces the proposed fee award, the un-awarded funds revert to the defendants-respondents rather than to the class. Class counsel are in effect paid directly by the defendants-respondents rather than by the class, and the class cannot benefit from any objections to, or judicial reduction of, the proposed fee award, discouraging scrutiny by objectors and the court. In a detailed legal analysis submitted to the American Bar Association's Standing Committee on Ethics and Professional Responsibility, twenty prominent law professors concluded that the increasingly common practice of negotiating such direct payment of attorney's fees by an adversary defendant while simultaneously inhibiting judicial scrutiny of the proposed settlement amounts to a *per se* breach of class counsel's duties to the class. *See* Letter dated Sept. 17, 2007, to ABA Standing Committee on Ethics and Professional Responsibility ("the ABA Letter"), *available at* http://www.fed-soc.org/docLib/20080801_letterto ABA.pdf (last visited Sept. 14, 2009).

The question presented is whether such a reversionary fee structure by its nature breaches the fiduciary duty and ethical obligations that class counsel owe to absent class members and violates the constitutional due process rights of absent class members which are protected by Rule 23 of the Federal Rules of Civil Procedure, precluding approval of a proposed class action settlement.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Marty Evans and Shrenik Bavishi were objectors in the district court and appellants in the Ninth Circuit. Bavishi has separately petitioned this Court for certiorari (No. 08-10952), and Evans has obtained an extension of time to do so (No. 09A136). They are being served herein as respondents.

Lawrence R. Kaufmann was an objector and proposed intervenor-plaintiff in the district court, but was permitted by the court to withdraw from the action pursuant to a private settlement with defendants.

Additional objectors in the district court who are no longer involved in this proceeding include Clinton E. Anderson, Steven D. Arkwright, Jason Cintron, Christopher C. Gabriel, Norman Demetrios Pappous and Geoffrey Earl Wilwerding.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT STATUTORY PROVISIONS	2
INTRODUCTION	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	10
I. The Reversionary Fee Structure Erroneously Approved by the Ninth Circuit Is a *Per Se* Breach of Class Counsel's Fiduciary Duty and Ethical Obligations to the Class.	12

Contents

Page

II. The Reversionary Fee Structure Improperly Inhibits the Scrutiny of a Proposed Class Action Settlement by Objectors and the Courts for the Protection of Absent Class Members. ... 17

III. The Ninth Circuit's Decision Merits Review Because Class Action Settlements Using the Reversionary Fee Structure Are Already Being Brought from Afar to the Ninth Circuit for Approval. 19

CONCLUSION 21

TABLE OF APPENDICES

Page

Appendix A — Memorandum Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed May 14, 2009 ..... 1a

Appendix B — Order (1) Granting Joint Motion For Final Approval Of Settlement; (2) Granting Class Counsel's Application For Attorney's Fees, Costs And Class Representative Enhancements Of The United States District Court For The Northern District Of California Filed January 26, 2007 ..... 11a

Appendix C — Order Denying Anthony D'aria's Motion To Intervene; Vacating Hearing Of The United States District Court For The Northern District Of California Filed January 17, 2007 ..... 54a

Appendix D — Order Of The United States District Court For The Northern District Of California Dated November 16, 2006 ..... 75a

Appendix E — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petitions For Rehearing Filed May 18, 2009 ..... 79a

TABLE OF CITED AUTHORITIES

Page

Cases

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 3, 9, 12

Basile et al. v. A.G. Edwards & Sons, Inc., Case No. 08 CV 0338 JAH (RBB) (S.D.Cal.) ...20, 21

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) ... 12

Bowman v. UBS Financial Services, Inc., Case No. C-04-03525 MMC (N.D.Cal.) 5, 21

Burns v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., Case No. C-04-04135 MMC (N.D.Cal. 2006) 21

Franklin v. Bank of America N.A., Case No. C 05-00519 CRB, slip op. (N.D.Cal. July 18, 2006) 15

Goldberger v. Integrated Resources, Inc., 209 F.3d 43 (2d Cir. 2000) 16

Hansberry v. Lee, 311 U.S. 32 (1940) 12

In re BankAmerica Corp. Sec. Litig., 350 F.3d 747 (8th Cir. 2003) 11

In re Cendant Corp. Litig., 264 F.3d 201 (3rd Cir. 2001) 11

Cited Authorities

Page

In re Consumer Privacy Cases, 175 Cal.App.4th 545 (1 Dist., June 30, 2009) 19

In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) 3, 12

In re Warner Communications Sec. Litig., 798 F.2d 35 (2nd Cir. 1986) 11

Kakani v. Oracle Corp., 2007 WL 1793774 (N.D.Cal. June 19, 2007) 21

Mirfasihi v. Fleet Mortgage Corp., 450 F.3d 745 (7th Cir. 2006) 11

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1997) ... 10-11

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 12

Staton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003) 17, 18

Steinberg et al. v. Morgan Stanley & Co., Inc., et al., Case No. 06 CV 2628 BEN (NLS) (S.D.Cal.) 20, 21

Cited Authorities

Page

Tarlecki v. Bebe Stores, Inc., 2009 WL 1364340 (N.D.Cal. May 14, 2009) 19, 21

Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518 (1st Cir. 1991) 16

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332(d)(2) 5

29 U.S.C. § 201 *et seq.* 5

Rules

Fed. R. Civ. P. 23 ..... *passim*

Other Authorities

Cal. Rules Prof. Conduct Rule 3-300(A) and (C) .. 13

U.S. Dept. of Labor Wage and Hour Div. Op. Letter FLSA2006-43 (Nov. 27, 2006) 10

Letter dated Sept. 17, 2007, to ABA Standing Committee on Ethics and Professional Responsibility, *available at* http://www.fed-soc.org/docLib/20080801_lettertoABA.pdf ..... *passim*

MANUAL FOR COMPLEX LITIGATION, § 23.12 (4th ed. 2004) 13

Petitioner Anthony D'Aria respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended memorandum disposition by the Ninth Circuit, which is designated not for publication, is reproduced at App. A. The Ninth Circuit's order denying a petition for rehearing and rehearing en banc, also not for publication, is reproduced at App. E.

The district court's unreported opinion granting final approval of the settlement is reproduced at App. B. The district court's unreported orders denying D'Aria's motion to join or substitute for Objector Kaufmann, and denying D'Aria's motion to intervene, are respectively reproduced at App. D and C.

JURISDICTION

The Ninth Circuit issued its amended memorandum disposition on May 14, 2009, and denied rehearing on May 18, 2009. *See* App. A; App. E. On August 14, 2009, Justice Kennedy granted an extension of time to file this petition until September 16, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Rule 23 of the Federal Rules of Civil Procedure provides in relevant part:

> *(a) Prerequisites.*
>
> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> . . .
>
> (4) the representative parties will fairly and adequately protect the interests of the class.
>
> *(e) Settlement, Voluntary Dismissal, or Compromise.*
>
> The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> . . .
>
> (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> . . .

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

INTRODUCTION

Petitioner seeks review of the Ninth Circuit's decision approving the use of a reversionary fee structure in a settlement of a class action. A reversionary fee structure in a class action settlement exemplifies the conflicted interests, perverse incentives and potential for collusion which are well recognized by this Court and others as an endemic problem in class action settlements. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995). In a detailed legal analysis submitted to the American Bar Association's Standing Committee on Ethics and Professional Responsibility, a group of twenty prominent law professors, including, *e.g.*, Yale Law's Peter H. Schuck and Columbia's William Simon, concluded that it is at least a presumptive, if not a *per se* breach of class counsel's fiduciary and ethical duties to the class to negotiate direct payment of attorney's fees by an adversary defendant, separate and apart from funds recovered for class members, as occurs when a reversionary fee structure is used. *See* ABA Letter, *supra*, 2, 12-15.

At the same time, the reversionary fee structure directly undermines the protections established by Rule 23 of the Federal Rules of Civil Procedure for the due process rights of absent class members, because the

structure intrinsically discourages scrutiny by objectors and the courts during the settlement approval process—an inhibiting effect that the signatories to the ABA Letter conclude is *per se* unethical. *See* ABA Letter, *supra*, 3, 16-17. It should be noted that the ABA Letter is the only scholarly and detailed analysis of this issue and there is no comparable authority that supports a reversionary fee structure as an acceptable means of structuring a proposed class action settlement.

Review of the Ninth Circuit's decision by this Court presents an opportunity to remedy a widely used, pernicious practice in class action settlements that has gone unchecked in dozens of cases over the past decades and that is otherwise likely to remain uncontrolled. Because the reversionary fee structure effectively insulates egregious conduct from judicial scrutiny, it is not likely to be further challenged elsewhere. The decision below is the first time an appellate court has directly examined a reversionary fee structure, despite the routine use of such structures in the settlement of many wage and hour and other class actions for many years, which simply demonstrates its effectiveness in inhibiting judicial review. The Ninth Circuit is already the venue of choice, for numerous plaintiff's counsel across the country in wage and hour litigation in particular, for approval of class action settlements using this structure to obtain inflated legal fees, and absent correction will no doubt remain so following the decision below.

STATEMENT OF THE CASE

1. The underlying class action alleged that the defendants-respondents ("UBS") misclassified their securities brokers as exempt under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and state labor laws, and asserted claims on behalf of a nationwide class of over 13,000 current and former UBS securities brokers (excluding UBS brokers in California) for unpaid overtime and unlawful wage deductions.

The action was settled before it was filed in the Northern District of California. Originally, plaintiffs-respondents individually commenced three actions on behalf of various classes of UBS brokers outside California, in the District of New Jersey, the Southern District of New York, and the District of Connecticut. Only three months after commencing the first of these actions (and days after filing the third), plaintiffs-respondents reached a proposed settlement with UBS of all nationwide claims outside California. The underlying action here was then commenced in order to consolidate the already settled nationwide (ex-California) claims for settlement approval.

Plaintiffs-respondents filed the case in the Northern District of California, where it was related to *Bowman v. UBS Financial Services, Inc.*, Case No. C-04-03525 MMC, an earlier case in which a similar settlement had been reached (containing an identical reversionary fee structure) for the claims of UBS brokers in California. The district court's jurisdiction was based on minimal diversity under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2).

2. The $45 million gross amount of the *Glass* settlement included both sums that were expressly out of reach of the class (*i.e.*, reversionary proposed awards of legal fees and named plaintiff enhancements), and sums that had no realistic chance of reaching the class (*i.e.*, the full amount of funds that were available to class members only on a claims-made basis).

The settlement agreement provided for class counsel to seek an award of $11,250,000 in attorney's fees, *i.e.*, 25% of the gross amount, plus enhancements for the named plaintiffs totaling $100,000.[1] If the court reduced these proposed awards, any disallowed amounts were subject to reversion to UBS, not to the class, making them unavailable to the class in any circumstances. *See* App. 14a.

The maximum amount actually available to pay class members was the $33,650,000 left after subtraction of the agreed $11.35 million in fees and enhancements. This amount was not paid to class members *pro rata*, but on a claims-made basis. The settlement provided for an agreed formula to evaluate individual claims, calculated to exhaust the available funds only if all class members submitted claims. *See* App. 14a (summarizing formula). The unclaimed funds left over if fewer than all class members submitted claims would revert to UBS.

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1. Plaintiffs-respondents' counsel did not dispute D'Aria's contention that they could not have expended more than approximately $250,000 in lodestar in the prosecution and settlement of this litigation, so that their fee request represented a multiplier of more than 40 times their lodestar. *Cf.* App. 48a (district court noting that lodestar-based fees would be "substantially lower" than the fee request due to absence of litigation activity prior to settlement).

Ultimately, class members submitted claims for approximately $21 million, *i.e.*, less than half of the gross settlement amount. *See* App. 23a. In effect, class counsel, the named plaintiffs, and UBS divided amongst themselves more of the settlement funds than were paid to the class.

3. D'Aria moved to intervene as a plaintiff with the express purpose of replacing the existing class representatives, whom he alleged had inadequately represented the class in prosecuting and settling the litigation. D'Aria's allegations in the courts below included, among other things:

— The reversionary fee structure breached class counsel's fiduciary and ethical obligations to the class and was designed to discourage scrutiny in the settlement approval process;

— The action's history suggested a collusive, pre-packaged settlement without any intention of adversarial litigation;

— Class counsel conducted minimal investigation of class claims and no adversarial litigation;

— Class counsel relied on UBS data on damages without expert assistance for the class, undervalued class claims, and provided no data to the court to evaluate the recovery;

— The legal fees for plaintiff's counsel provided by the proposed settlement were exorbitant in relation to the negligible prosecution of the action;

— The notice to class members failed adequately to disclose the settlement's reversionary structure, both as to legal fees and as to the overall value of the settlement to class members.

Procedural obstacles thwarted D'Aria. Before D'Aria came forward as a litigant, the same arguments against the proposed settlement were originally raised by another class member, objector and proposed intervenor Lawrence Kaufmann (also represented by D'Aria's counsel here). In an eleventh-hour surprise, however, Kaufmann exited the litigation, disclosing that UBS had secretly negotiated a private settlement with Kaufmann behind the back of his counsel in exchange for withdrawal of his objection and motion to intervene. D'Aria only sought entry into the litigation after Kaufmann unexpectedly withdrew, whereupon D'Aria immediately moved to substitute himself for Kaufmann as both an objector and proposed intervenor. *See* App. 55a-56a (procedural timeline). The district court denied D'Aria's motion on procedural grounds the same day within hours of its filing. *See* App. D. D'Aria then moved to intervene, but the court denied the motion as untimely. *See* App. C. The Ninth Circuit affirmed the district court's denial of D'Aria's motion to intervene on timeliness grounds without analysis of the circumstances. *See* App. 10a.

The procedural merits of D'Aria's efforts to be heard in the courts below—be it as an objector, an intervenor-plaintiff, or both—are immaterial here, however. The settlement approval process established by Rule 23(e) is specifically meant to protect the rights of absent

class members. *See, e.g., Amchem*, 521 U.S. at 620. If D'Aria is correct that the district court abused its discretion in approving an inherently flawed settlement and the Ninth Circuit erred in affirming the district court, then by definition, the interests of D'Aria and other class members were not adequately protected by the present class counsel and D'Aria should have been permitted to object and/or intervene. Thus, if D'Aria is correct on the merits of his argument against settlement approval, then the courts below committed procedural error one way or another when they failed to hear and consider his arguments about settlement approval during the settlement approval process.

4. Even though the Ninth Circuit did not reach D'Aria's arguments concerning settlement approval, it did address the reversionary fee structure in the context of whether the attorney's fees should be approved.[2]

The Ninth Circuit acknowledged that the reversionary fee structure was "problematic because it acts as a device to isolate fees from scrutiny," and because it incentivized inflation of attorney's fees at the expense of funds available to the class. App. 6a-7a. Nevertheless, the Ninth Circuit followed the district court in affirming the reversionary fee structure. In particular, ten months *after* the proposed settlement was reached, the United States Department of Labor issued an opinion letter stating that stockbrokers may under certain circumstances meet the requirements for

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2. The Ninth Circuit erroneously attributed D'Aria's arguments on the reversionary fee structure to Objector Marty Evans, who appealed on the issue of attorney's fees.

exemption from the Fair Labor Standards Act. *See* DOL WH Op. Letter FLSA2006-43 (Nov. 27, 2006). Because the opinion letter weakened class members' claims under the Act,[3] the district court found that expeditious settlement in advance of the opinion letter justified the attorney's fees. App. 48a-50a. The Ninth Circuit agreed:

> The fact that class counsel achieved such timely results for the class suggest that the class's interests were not compromised by the reversion clause, and that the district court did not abuse its discretion in finding that the settlement was fair and adequate.

App. 8a. In effect, the Ninth Circuit seemed to be saying that illegal or unethical conduct by plaintiffs' class counsel may be overlooked if the court concludes that a proposed settlement in other ways benefitted the class.

REASONS FOR GRANTING THE PETITION

It was not the Ninth Circuit's role, or the district court's, to parse reasons why it might disregard the proposed settlement's inherent violations of duties owed to absent class members and of the procedures established to protect them. Rule 23 among other things protects the constitutional due process rights of absent class members. *See, e.g., Ortiz v. Fibreboard Corp.*, 527

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3. The Ninth Circuit also noted "forward-looking relief" obtained for the class, App. 8a, referring to changes in UBS compensation policy that were made part of the proposed settlement after it came under challenge during the settlement approval process.

U.S. 815, 845-846 (1997) (describing constitutional rights of absent class members implicated by mandatory class actions aggregating damages claims). Accordingly, during the settlement approval process, the court's responsibilities concerning the rights of absent class members are widely recognized as fiduciary in character. *See, e.g., Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 748 (7th Cir. 2006) (district court "functions as a fiduciary of the class, and is subject to the high duty of care that the law requires of fiduciaries"); *In re BankAmerica Corp. Sec. Litig.*, 350 F.3d 747, 751 (8th Cir. 2003) (district court is "a fiduciary who must serve as guardian of the rights of absent class members"); *In re Cendant Corp. Litig.*, 264 F.3d 201, 232 (3rd Cir. 2001); *In re Warner Communications Sec. Litig.*, 798 F.2d 35, 37 (2nd Cir. 1986).

Both the Ninth Circuit and the district court should have looked no further than the inherently perverse, reversionary fee structure itself to determine that the proposed settlement violated the constitutional due process rights of absent class members. There is no discernible benefit to absent class members in permitting the use of reversionary fee structures in class action settlements, as compared to a traditional common fund settlement where the interests of class counsel and absent class members are more clearly aligned. Rather, for the reasons discussed below, a class action settlement shaped by the ethical conflicts, perverse incentives and procedural distortions of a reversionary fee structure *ipso facto* is not "fair, reasonable and adequate" under Rule 23(e)(2) and should not be approved. For the same reasons, a reversionary fee structure renders adequate representation under Rule 23(a)(4) impossible, and

poses an insurmountable obstacle to settlement-only class certification antecedent to settlement approval. Rule 23(a)(4) requires that named plaintiffs must at all times adequately represent the interests of absent class members, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45 (1940)), which also encompasses adequate representation by class counsel. *See, e.g., In re General Motors Corp.*, 55 F.3d at 801. This requirement, which is meant to protect absent class members, demands more, not less judicial attention in settlement-only cases. *Amchem*, 521 U.S. at 620.

I. The Reversionary Fee Structure Erroneously Approved by the Ninth Circuit Is a *Per Se* Breach of Class Counsel's Fiduciary Duty and Ethical Obligations to the Class.

1. In a common fund settlement, although the settlement fund originates from the defendants, class counsel receive their fees from the class, paid out of its recovery. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). As a consequence, if the court orders the proposed attorney's fees to be reduced, a corresponding sum becomes available for distribution to the class.

Under a reversionary fee structure, however, class counsel are in effect paid by the defendant rather than by the class. Attorney's fees cannot be said to come from the class under a reversionary fee structure, because the fund proposed to pay the attorney's fees is permanently separated from the fund available to the class: if the court reduces the proposed fees, defendants simply keep the difference. (The same is also true with

respect to enhancements for named plaintiffs proposed on a reversionary basis.)

Payment by the adversary rather than the client poses a serious conflict of interest for plaintiff's attorneys. In the ABA Letter cited above, the signatory law professors concluded that it is presumptively if not *per se* unethical for plaintiff's attorneys in a contingency fee litigation to negotiate direct payment of their fees by an adversary defendant. *See* ABA Letter, *supra*, 2, 12-15. This conclusion applies with particular force in a class action, where the plaintiff's attorneys owe a fiduciary level of loyalty and care to the class as a whole, *i.e.*, to all absent class members, even before formal class certification.[4] *See* MANUAL FOR COMPLEX LITIGATION, §23.12, n. 753 (4th ed. 2004); *cf.* Fed. R. Civ. P. 23(g)(2)(A) committee note.

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4. It is worth noting that even the apparent conflict of interest faced by class counsel using a reversionary fee structure defies any easy formal resolution. The usual ethical rules applicable to attorney-client relationships typically may permit an apparent conflict of interest if, *inter alia*, it is fully disclosed to and ratified by the client. *See, e.g.*, Cal. Rules Prof. Conduct Rule 3-300(A) and (C). In a class action, however, such disclosure and ratification by absent class members is scarcely possible. Ratification by the class representatives who are designated to stand in for the absent class members is also problematic, however, because the reversionary fee structure places the class representatives in exactly the same conflict as their counsel: as named plaintiffs, they benefit from enhancement awards which are unavailable to absent class members and are afflicted by the same conflicts as the attorney's fees, *i.e.*, paid directly by the defendant.

2. The interests respectively of class counsel and absent class members sharply diverge when a reversionary fee structure is used, because the structure "creates incentives for the negotiating parties to make the attorneys' fees a larger percentage of the total recovery," as the Ninth Circuit recognized but failed to explore. App. 7a. Strikingly perverse incentives arise when a reversionary fee structure applies to a "claims-made" settlement, as is commonly the case and is presented by the proposed settlement here, *i.e.*, the settlement provides that claimants receive sums calculated to exhaust the fund only if all class members lodge claims, and any unclaimed remainder reverts to the defendant. In such a situation, the use of a reversionary fee structure fosters profound conflicts of interest and even collusion.

Economically, a defendant is motivated to negotiate a claims-made settlement by the expectation that its actual payout to class members, based on the ultimate claims rate, will be smaller than the amount it would have to pay on a non-reversionary, or common fund basis. Class counsel must conversely calculate that the actual payout is likely to be higher than the amount obtainable from the defendant on a non-reversionary basis.

The risk in class counsel's calculation falls only on the class, however, not on class counsel. At best, class counsel are bargaining for a *chance* that class members' will maximize their recovery, while simultaneously bargaining to *assure* that their own fees are maximized. While the class recovery is uncertain, the reversionary structure clearly maximizes attorney's fees because the

base attorney's fee percentage applies to a nominal amount (*i.e.*, the gross settlement amount) which is inflated relative to the class recovery in two distinct respects: First, fees are earned on the proposed awards of fees and enhancements even though these sums can never become available to the class under a reversionary fee structure, *i.e.*, class counsel are being rewarded by the court for obtaining funds that can only be paid to class counsel or revert to defendant, but can never be paid to class members. Second, fees are earned on the entire maximum amount payable to the class even though in a claims-made settlement it is certain to be paid out only fractionally—as Judge Breyer in the Northern District of California observed concerning a proposed fee award based on the maximum amount of a claims-made settlement:

> When the parties settled this lawsuit for $9 million maximum payment amount they did not expect that defendant would actually pay $9 million. . . . Indeed in this Court's experience the claim rate is generally what it is in this case, 40 to 50 percent. Thus, the $9 million figure is a fiction.

Franklin v. Bank of America N.A., Case No. C 05-00519 CRB, slip op. at 6 (N.D.Cal. July 18, 2006) (reducing requested attorney's fee award *sua sponte*). Unlike the recovery for class members, moreover, the attorney's fees do not depend on the ultimate claims rate, but are calculable in advance.[5] Further exacerbating the lopsided

5. The only risk to which class counsel are exposed when relying on such a proposed fee award is the possibility that it may be reduced by a reviewing court, but as discussed below, the reversionary fee structure also defends against this possibility by inhibiting judicial scrutiny.

risk faced by the class, class counsel's economic incentive after the settlement is reached is merely to achieve a claims rate sufficient to garner court approval, not necessarily to maximize the claims rate for the benefit of the class.

At worst, of course, class counsel may not be motivated by some speculative benefit to the class at all, but may instead simply (and illegally) reach a bargain with the adversary defendant to take fees in a substantially larger proportion of the funds available from the defendant in exchange for the defendant's contributing a smaller total amount. *See, e.g., Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 52-53 (2d Cir. 2000) (noting "the temptation for the lawyers to agree to a less than optimal settlement 'in exchange for red-carpet treatment on fees,'" quoting *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991)). A reversionary fee structure simultaneously provides a vehicle for such collusion against absent class members and (as discussed below) discourages scrutiny by objectors and the courts.

3. In addition, the reversionary fee structure by its nature inflicts a direct pecuniary loss on the class: the loss of access to any part of the proposed fees and enhancements that a reviewing court may ultimately decline to award. Even in the context of a claims-made settlement, where defendants do not expect to pay the full amount set aside for claims, they do expect to pay the full amount of the proposed awards of fees and enhancements that are specified in the settlement agreement. There is therefore no doubt that the sums set aside for such awards were potentially available to

the class if they were part of a common fund for both claims and fees, instead of being severed by the reversionary fee structure; no speculative calculations about the expected claims rate can justify this dead loss to the class.

II. The Reversionary Fee Structure Improperly Inhibits the Scrutiny of a Proposed Class Action Settlement by Objectors and the Courts for the Protection of Absent Class Members.

As the Ninth Circuit noted, a reversionary fee structure operates to insulate the proposed settlement, with all the inherent conflicts and perverse incentives noted above, from scrutiny both by objectors and by the courts:

> A reversion clause for attorneys' fees is problematic because it removes an important economic incentive that class members may have in challenging a fee award that may be excessive under the circumstances. The clause also gives the district court one less reason to challenge an award of attorneys' fees where any reduction would only benefit the defendant, who may have all but admitted to significant violations of the law.

App. 7a, fn.2 (citing *Staton v. Boeing Co.*, 327 F.3d 938, 970 (9th Cir. 2003) (rejecting a condition that would "inhibit district courts from engaging in independent determinations of reasonable fees")).

The signatory law professors to the ABA Letter concluded that direct fee negotiation with defendants that has the effect of inhibiting judicial review is *per se* unethical. ABA Letter, *supra*, 16-18. The tendency of a reversionary fee structure to inhibit review is antithetical to Rule 23, which embodies the directly contrary view that constitutional due process requires that absent class members obtain the benefit of a rigorous review by the court assisted by objectors who are economically motivated to assert objections that ultimately benefit the class.

The continuing and widespread use of the reversionary fee structure in class action settlements approved by the courts (particularly in the Ninth Circuit, as discussed below), shows how effectively the structure discourages judicial scrutiny. This case exemplifies this inhibiting effect, even where class members have come forward to challenge the settlement in detail. Acknowledging at least in general terms that the reversionary fee structure posed conflicts of interest, the Ninth Circuit here held that the district court was "required to 'ensure that the class members' interest were not compromised in favor of those of class counsel.' *See Staton*, 327 F.3d at 964-965." App. 7a. The Ninth Circuit did not examine whether the settlement compromised class members' interests, however; instead, it affirmed on the basis of the district court's findings that events *after the settlement was reached* (notably the Department of Labor's subsequent opinion letter) increased its value to the class, and reasoned indirectly that these results "suggest[ed] that the class's interests were not compromised by the reversion clause." *See* App. 7a-8a.

This reasoning contains more evasion than analysis. The Ninth Circuit failed to recognize that the reversionary fee structure is itself an impermissible compromise of absent class members' interests. Absent class members cannot be said to have obtained due process under Rule 23 in the course of the approval of a proposed settlement affecting their interests if that very approval process is corrupted by breaches of fiduciary duty and ethical obligations by class counsel that are simply overlooked by the district court or the Court of Appeals because class members benefitted in other ways from the settlement.

III. The Ninth Circuit's Decision Merits Review Because Class Action Settlements Using the Reversionary Fee Structure Are Already Being Brought from Afar to the Ninth Circuit for Approval.

No prior authority approves a reversionary fee structure in a class action settlement, as the Ninth Circuit noted in its decision below.[6] App. 7a, fn.2. This is despite the fact that the structure has been widely

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6. Since then, a Court of Appeal of the State of California has also approved a reversionary fee structure in a class action settlement, dismissing an appeal on the issue of attorney's fees by an objector represented by the same counsel as Objector Marty Evans in the instant case. *In re Consumer Privacy Cases*, 175 Cal.App.4th 545 (1 Dist., June 30, 2009). One district court in the Northern District of California, however, has cited the inhibiting effect of a reversionary fee structure on fee scrutiny as the reason for declining to approve a proposed class action settlement under Rule 23(e). *Tarlecki v. Bebe Stores, Inc.*, 2009 WL 1364340 (N.D.Cal. May 14, 2009).

and regularly used for many years, particularly in settlement of wage and hour class actions. During oral argument in the Ninth Circuit, defendants-respondents' outside counsel observed that "a reversion clause is common in the resolution of wage and hour class actions. Of the hundreds that I have settled, I could not [sic] count on one hand the number that are not reversionary." *D'Aria v. UBS Financial*, Case No. 07-15278 audio recording (Jan. 14, 2009), *available at* <http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002615> (last visited Sept. 16, 2009), at 16 min. 28 sec. (responding to question about justification for the reversionary fee structure from Noonan, J.). Further significant caselaw on the structure is unlikely to develop, not only because it effectively discourages review (as discussed above), but because the reversionary fee structure is thriving in the Ninth Circuit, where it has now been officially approved in the instant case.

California courts have become a magnet for nationwide settlements of the type presented here. For example, two other nationwide wage and hour class actions involving overtime and related claims by securities brokers were recently approved in the Southern District of California: *Steinberg et al. v. Morgan Stanley & Co., Inc., et al.*, Case No. 06 CV 2628 BEN (NLS) (S.D.Cal.), and *Basile et al. v. A.G. Edwards & Sons, Inc.*, Case No. 08 CV 0338 JAH (RBB) (S.D.Cal.). Both cases proposed claims-made settlements with reversionary attorney's fee awards. Both cases also represent major nationwide class actions brought to the federal courts in California for settlement-only proceedings even though they have nothing to do with

the State of California—like the instant *Glass* action, the proposed settlements exclude California brokers.[7]

Some other cases in the Ninth Circuit using reversionary fee structures include, *e.g.*, *Bowman v. UBS Financial Services*, *supra* (settlement and fee request finally approved); *Burns v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, Case No. C-04-04135 MMC (N.D.Cal. 2006) (settlement and fee request finally approved); *Kakani v. Oracle Corp.*, 2007 WL 1793774 (N.D.Cal. June 19, 2007) (denying preliminary settlement approval for other reasons); and *Tarlecki v. Bebe Stores*, *supra* (denying settlement approval on grounds of reversionary fee structure).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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7. The *Steinberg* settlement excludes California brokers from its non-managerial classes, but includes them in its manager class. *Basile* excludes California brokers altogether.

APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 14, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-15278

D.C. No. CV-06-04068-MMC

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation,

Defendants - Appellees,

v.

ANTHONY D'ARIA,

Plaintiff-intervenor - Appellant.

Appendix A

No. 07-15309

D.C. No. CV-06-04068-MMC

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs,

and

MARTY EVANS,

Plaintiff - Appellant,

v.

UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation,

Defendants - Appellees,

v.

ANTHONY D'ARIA,

Plaintiff-intervenor.

Appendix A

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted January 14, 2009
San Francisco, California

Filed May 14, 2009.

Before FARRIS, NOONAN and McKEOWN, Circuit Judges.

MEMORANDUM*

This dispute arises from the district court's approval of a class action settlement between the named plaintiffs and the defendant, UBS Financial Services. On appeal, plaintiff-objector Marty Evans raises several objections to the district court's determination that the settlement was fair, reasonable, and adequate as required by Fed. R. Civ. P. 23(e). Appellant Anthony D'Aria objects to the district court's denial of his motion to intervene in the case on the grounds that it was untimely. The parties are familiar with the facts.

I. *Pending motions*

We grant UBS's motion to strike documents from D'Aria's excerpts of record which were submitted to the

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

district court after the final approval of the settlement. *See Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077-78 (9th Cir. 1988). We also grant UBS's motion for judicial notice of the *Bowman* declaration.

II. *Evans's Claims*

Evans argues, on several grounds, that the district court abused its discretion in determining that the settlement was fundamentally "fair, reasonable, and adequate," as required by the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23(e). "The district court's decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants, and their strategies, positions, and proof." *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000) (internal citations omitted). Each of Evans' arguments is addressed below.

First, Evans argues that because the named plaintiffs are all former employees of defendants, they cannot fairly and adequately represent a class that includes both current and former UBS employees. ER 474. A class action may be maintained only if "the representative parties will fairly and adequately protect the interest of the class." Fed. R. Civ. P. 23(a)(4). The present settlement aims to provide compensation for unlawful practices occurring during the class period. For that period, "both the former and current employees are equally interested in obtaining compensation for the assertedly unlawful practices set forth in the complaint."

ER 475.[1] Therefore, the district court did not abuse its discretion in finding that the class-representatives adequately represented the interests of the class. *See Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003) ("this circuit does not favor denial of class certification on the basis of speculative conflicts").

Second, Evans argues that the court violated the rights of class members from states other than New York, Pennsylvania, and New Jersey by approving a plan of allocation that distributes a greater proportion of the settlement funds to class members in those states. ER 63. The Special Master and the district court found that the parties had set forth a reasoned basis for treating claimants employed in these three states differently from claimants in other jurisdictions. ER 479; *see also*, JSER 197(Special Master's report concluding that the disproportionate allocation was justified by differences among the states regarding "the definition of employees; the definition of wages; various exemptions; varieties of allowed or disallowed deductions from employee compensation; elements of the causes of action available in various states; and variances in the recoveries of the debt, interest, attorneys' fees, costs and penalties"). On appeal, Evans does not address the substance of the parties' or the court's reasoning, nor does he address the differences in law between the

1. As the district court noted, the settlement does not preclude any class member from filing suit against UBS for violation of the law occurring outside of the class period. ER 475.

states at issue. Moreover, the fact that one of the named plaintiffs was a class member from a state other than New York, New Jersey, and Pennsylvania, undermines Evans's allegations of inadequate representation. ER 461, n. 1. Therefore, the district court did not abuse its discretion in rejecting Evans's objection to the plan of allocation.

Third, Evans argues that the district court erred in appointing a Special Master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, without first obtaining consent from Evans. ER 476; Fed. R. Civ. P. 53. Rule 53(a) permits the appointment of a Special Master for, among other things, the "perform[ance of] duties consented to by the parties," or without consent when appointment is warranted by "the need to perform an accounting or resolve a difficult computation of damages." *See* Fed. R. Civ. P. 53(a)(1)(A)-(C). In this case the named plaintiffs representing the class and the defendant together requested the appointment of the Master to address the parties' damages analysis. This is sufficient to justify the appointment of a special Master.

Fourth, Evans challenges a provision in the settlement stating that any reduction in attorneys' fees by the court will revert to the defendant, rather than to the class. ER 63-64. We agree that the reversion clause, as pertaining to attorneys' fees, is problematic because it acts as a device to isolate fees from scrutiny. *See Staton v. Boeing Co.*, 327 F.3d 938, 964-965, 970-71

(9th Cir. 2003).[2] In addition to being favorable to class counsel, the reversion clause is favorable to UBS, which will receive the ultimate benefit of any reduction by the court. Because the reversion clause creates incentives for the negotiating parties to make the attorneys' fees a larger percentage of the total recovery, the district court is required to "ensure that the class members' interest were not compromised in favor of those of class counsel." *See Staton*, 327 F.3d at 964-65.

Here, the district court found that the class members obtained exceptional results for the class. ER 483-84. Notably, the class representatives were able to negotiate the settlement before the Department of Labor issued an Opinion Letter that would have reduced the value of plaintiffs' claims. *See* ER 465; 483-84. The

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2. While clauses mandating the reversion of unclaimed funds may be common, appellees cite to no cases approving a settlement with a reversion clause for attorneys' fees. *See* UBS Brief at 101-02. In fact, the Ninth Circuit in *Staton* stated that ordinarily, "after the court determines the reasonable amount of attorneys' fees, all the remaining value of the fund belongs to the class rather than reverting to the defendant." 327 F.3d at 971. A reversion clause for attorneys' fees is problematic because it removes an important economic incentive that class members may have in challenging a fee award that may be excessive under the circumstances. The clause also gives the district court one less reason to challenge an award of attorneys' fees where any reduction would only benefit the defendant, who may have all but admitted to significant violations of the law. *See Staton*, 327 F.3d at 970 (rejecting a condition that would "inhibit district courts from engaging in independent determinations of reasonable fees").

court also acknowledged evidence of additional value in the settlement in the form of forward-looking relief. *See* ER 475, n. 7; JSER 114-15. The fact that class counsel achieved such timely results for the class suggest that the class's interests were not compromised by the reversion clause, and that the district court did not abuse its discretion in finding that the settlement was fair and adequate.

Finally, Evans argues that the court's approval of an attorneys' fees award consisting of 25% of the total award constitutes an abuse of discretion. While we agree that the court's award of attorneys' fees is high relative to the total class recovery, the question on appeal "is not whether the district court should have applied some other percentage, but whether in arriving at its percentage it *considered all the circumstances of the case* and reached a *reasonable* percentage." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002) (emphasis added). In reviewing the award of attorneys' fees, the district court properly performed an informal lodestar cross-check, and noted the relatively low time-commitment by plaintiff's counsel. *See* Hearing Transcript of January 19, 2007 (Dkt.238); ER 483; *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)(suggesting a lodestar cross-check and adjustment in special circumstances when "the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors"). Having acknowledged that the lodestar factors weigh against a substantial award, the district court did not abuse its discretion in giving weight

to other factors, such as the results achieved for the class and the favorable timing of the settlement. *See Vizcaino*, 290 F.3d at 1047-50. Under these circumstances, the court's ultimate award of 25% was not unreasonable. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (referring to 25% in attorneys' fees as a "benchmark award"). Further, the court's calculation of 25% of the total award, rather than 25% of the amount actually collected by the class, was proper, and was in line with Ninth circuit precedent. *See id.* (discussing awards of 25% of *the common fund* as benchmark figure).

Evans also argues that the district court abused its discretion in using the percent-of-recovery approach (rather than the lodestar multiplier approach) in calculating attorneys' fees. However, "[i]n 'common-fund' cases where the settlement or award creates a large fund for distribution to the class, the district court has discretion to use either a percentage or lodestar method." *Hanlon*, 150 F.3d at 1029 (internal citations omitted). Similarly, Evans' contention that the district court erred in using common fund principles in assessing the award of attorneys' fees is inconsistent with Ninth Circuit jurisprudence, which permits the application of common fund principles where-as in the present case-the class of beneficiaries is identifiable and the benefits can be traced in order to allocate the fees to the class. *See Petition of Hill*, 775 F.2d 1037, 1041 (9th Cir. 1985) (citing *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 265 n. 39 (1975)).

Therefore, the district court did not abuse its discretion in approving the settlement, including the award of attorneys' fees, as fair, reasonable, and adequate.

III. *D'Aria's Claim*

In order to challenge the fairness of the settlement or the reasonableness of class counsel's fees, D'Aria must either submit a timely objection to the settlement or be granted leave to intervene. D'Aria failed to submit a timely objection to the settlement. One month after the deadline to opt out of the settlement, D'Aria sought to intervene in the suit as a matter of right, pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. *See* Fed.R.Civ.P. 24(a); ER 448. The district court properly denied D'Aria's motion to intervene as of right because D'Aria's motion was untimely. *See* ER 451-454.

The district court's decision is AFFIRMED.

APPENDIX B — ORDER (1) GRANTING JOINT MOTION FOR FINAL APPROVAL OF SETTLEMENT; (2) GRANTING CLASS COUNSEL'S APPLICATION FOR ATTORNEY'S FEES, COSTS AND CLASS REPRESENTATIVE ENHANCEMENTS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED JANUARY 26, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-06-4068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

ORDER (1) GRANTING JOINT MOTION FOR FINAL APPROVAL OF SETTLEMENT; (2) GRANTING CLASS COUNSEL'S APPLICATION FOR ATTORNEY'S FEES, COSTS AND CLASS REPRESENTATIVE ENHANCEMENTS

(Docket Nos. 183, 185)

Appendix B

Before the Court are two motions filed January 5, 2007: (1) the parties' joint motion for final approval of settlement; and (2) class counsel's application for attorney's fees, costs, and class representative enhancements. On January 19, 2006, the Court held a fairness hearing. Having considered the papers filed in support of the motions, and the arguments of counsel for the parties and for objector Marty Evans at the fairness hearing, the Court rules as follows.

BACKGROUND

The instant class action is asserted on behalf of a class consisting of all persons who, at any time during the applicable statute of limitations, are or were employed as stockbrokers at any of the brokerage offices of UBS Financial Services Inc. or its predecessors, UBS Paine Webber and Paine Webber Group Inc., anywhere in the United States or its territories, excluding California. (*See* Compl. ¶ 1.) Plaintiffs Joseph Glass, Dante DiFrancesco, Ralph Carbone, and David Bachrach allege that they worked as stockbrokers for defendant UBS Financial Services, Inc. and/or its predecessors UBS Paine Webber and Paine Webber Group, Inc. (*See id.* ¶¶ 7-10.) The first four causes of action are for failure to pay overtime wages in violation of the federal Fair Labor Standards Act, and New Jersey, New York, and Connecticut law.[1] (*See id.* ¶¶ 27-55.) The fifth, sixth,

1. Glass and Bachrach allege they worked for defendants in New Jersey. (*See* Compl. ¶¶ 7, 10.) DiFrancesco alleges he worked for defendants in New York. (*See id.* ¶ 8.) Carbone alleges he worked for defendants in Connecticut. (*See id.* at 9.)

and seventh causes of action are for improper deductions from wages in violation of New Jersey, New York, and Connecticut Law. (*See id.* ¶¶ 56-70.)

The action was settled on January 31, 2006 during a mediation conducted by David Rotman, who, defense counsel attests, is "one of the preeminent mediators of employment law claims in the country." (*See* Wilcox Decl. ¶ 3.) On July 28, 2006, the parties filed a joint motion for preliminary approval of the proposed settlement. The amended joint stipulation of settlement provides for a maximum payment of $45,000,000 to a class consisting of "all persons who work or worked for UBS in the Covered Positions during the Covered Period in the United States including United States territories, and excluding the state of California." (*See* Amended Joint Stipulation of Settlement ¶¶ 5, 29(a).) "UBS" is defined to include "UBS Financial Services, Inc. and all of its officers, directors, agents, attorneys, parents, predecessors (including UBS Paine Webber and Paine Webber Group Inc.), successors, subsidiaries, and related and affiliated entities, including UBS International, Inc." (*See id.* ¶ 2.) The "covered positions" are defined as "job codes 226 and 008226, Unregistered Trainee; job codes 456 and 008456, Broker; and job codes 457 and 008457, Registered Trainee at UBS." (*See id.* ¶ 14.) The "covered period" varies depending on "the applicable statute of limitations period for the jurisdiction in which the Class Member was employed." (*See id.* ¶ 13 and Ex. E.)

Appendix B

The proposed settlement further provides that of the $45,000,000 settlement amount, the following amounts will be deducted, subject to court approval: (1) attorney's fees and litigation costs in an amount up to $11,250,000; (2) "enhancements" to the four named class representatives, in an amount up to $100,000 ($25,000 each); and (3) a "reasonable amount" to the Claims Administrator to administer the settlement. (*See id.* ¶ 29(a).) The settlement provides that all unclaimed funds will revert to UBS, as well as any portion of the maximum $11,500,000 in attorney's fees and $100,000 in enhancements that is not awarded by the Court. (*See id.* ¶¶ 29(b), 30-31.)

Each class member who participates in the settlement will receive a fixed payment from the settlement fund based on the number of months or partial months he or she worked in a covered position for the period between the commencement of the applicable statute of limitations for the state or territory in which that class member worked for UBS and the date of preliminary approval. (*See id.* ¶ 32(c).) The Class Notice provides that class members who worked in New York, New Jersey, or Pennsylvania will receive $120.00 for each full or partial month worked during the class period, while class members who worked in other states will receive $75.00 for each full or partial month worked during the class period.[2] (*See* Class Notice at 3 ¶ C.)

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2. According to the settlement, "The formula developed by the parties allocates a greater proportion of the settlement funds to class members in New York, New Jersey, and (Cont'd)

Appendix B

On August 25, 2006, the Court granted preliminary approval of the settlement and set a fairness hearing for January 19, 2007. Pursuant to the Class Notice, any objections to the settlement were required to be mailed on or before November 14, 2006. (*See* Class Notice at 7 ¶ C.)

The Court received objections to the settlement from the following class members: (1) Clinton E. Anderson ("Anderson"), dated September 20, 2006; (2) Norman Demetrios Pappous ("Pappous"), dated September 20, 2006; (3) Steven D. Arkwright ("Arkwright"), dated September 21, 2006; (4) Jason Cintron ("Cintron"), dated September 26, 2006; (5) Geoffrey Earl Wilwerding ("Wilwerding"), dated October 18, 2006; (6) Christopher C. Gabriel ("Gabriel"), dated November 7, 2006; (7) Marty Evans ("Evans"), dated November 14, 2006; and (8) Shrenik Bavishi ("Bavishi"), dated November 14, 2006. Evans also filed supplemental objections, dated December 21, 2006, relating to the Court's appointment of a special master. In addition, the Court, on January 8, 2007, granted the motion of the Attorney General of the State of New York ("New York Attorney General") to appear as amicus curiae, and the New York Attorney General has filed an amicus brief raising its concerns about the settlement.

(Cont'd)
Pennsylvania than to class members in other jurisdictions because the law and litigation activity regarding wage deductions in other jurisdictions likely would have caused the parties to devote disproportionate resources to the litigation with uncertain results." (*See id.* ¶ 29(b).)

Additionally, class member Lawrence R. Kaufmann ("Kaufmann") filed a motion to intervene, which motion contained objections to the settlement. Kaufmann subsequently withdrew the motion. By orders filed November 16, 2006 and January 17, 2007, the Court permitted Kaufmann to withdraw, respectively, both his motion to intervene and his objections to the proposed settlement. After Kaufmann withdrew his motion to intervene, class member Anthony D'Aria filed a motion to adopt Kaufmann's objections and a motion to intervene in the action. By orders filed November 16, 2006 and January 17, 2007, respectively, the Court denied D'Aria's motions.

On December 7, 2006, pursuant to the joint motion of the parties, the Court appointed the Honorable Charles A. Legge (hereafter "Judge Legge") as a special master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, "to review issues or questions . . . relative to the allocation among different states of the settlement proceeds" and to "determine whether the allocation formula in the settlement is fair, reasonable and adequate in light of any timely challenges to that allocation." (*See* Order Appointing the Honorable Charles Legge as Master Pursuant to the Stipulation of the Parties ("Stipulated Appointment Order"), filed Dec. 7, 2006, at 2-3.) Pursuant to such authority, Judge Legge held a hearing on the matter on January 4, 2007, and, on January 12, 2007, filed a "Report, Findings and Recommendations of the Master."

Appendix B

LEGAL STANDARD

The Court may approve a class action settlement "only after a hearing and on finding that the settlement . . . is fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(1)(C). "Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

"It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Id.* "The settlement must stand or fall in its entirety." *Id.* The Court may not delete, modify, or rewrite particular provisions of the settlement. *See id.* "Settlement is the offspring of compromise; the question . . . is not whether the final product could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion." *See id.*

Appendix B

DISCUSSION

A. Joint Motion for Final Approval

1. Strength of case

The Court is aware of no controlling federal or state authority on the issue of whether stockbrokers are entitled to overtime pay. As set forth below, the legal uncertainty at the time of settlement with respect to whether stockbrokers are entitled to overtime under federal and state law thus favors settlement of the instant action.

The FLSA contains various exemptions from its requirement that employers pay their employees time and a half for work in excess of 40 hours per week, including, in particular, an exemption for "any employee employed in a bona fide . . . administrative . . . capacity." *See In re Farmers Insurance Exchange,* 466 F.3d 853, 858-59 (9th Cir. 2006); *see also* 29 U.S.C. § 213(a)(1). After the instant settlement was negotiated, one federal district court held the question of whether the stockbroker plaintiffs therein had performed work qualifying for such "administrative exemption" presented a triable issue of material fact that precluded summary judgment. *See Takacs v. A.G. Edwards and Sons, Inc.*, 444 F. Supp. 2d 1100, 1110-13 (S.D. Cal. 2006). Thereafter, on November 27, 2006, the Department of Labor issued an Opinion Letter stating that stockbrokers, to the extent they perform certain duties, meet the requirements of the administrative exemption

and, thus, are not entitled to overtime under the FLSA. (*See* Wilcox Decl. Ex. I at 8.) Although not binding authority, courts "must give deference to the DOL's interpretation of its own regulations through, for example, Opinion Letters." *See Farmers*, 466 F.3d at 860. No court to date has determined the appropriate amount of deference to be afforded the November 27, 2006 Opinion Letter. As the parties note, "[t]he bottom line is that the law in this area is sparse and the outcome of any litigation was far from clear, for either UBS or the Plaintiffs."

Accordingly, this factor supports approval of the settlement.

2. The risk, expense, complexity, and likely duration of further litigation

In light of the above-referenced uncertainty in the law, the risk, expense, complexity, and likely duration of further litigation likewise favors the settlement. Regardless of how this Court might have ruled on the merits of the legal issues, the losing party likely would have appealed, and the parties would have faced the expense and uncertainty of litigating an appeal. "The expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." *See In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000). Here, the risk of further litigation is substantial.

Accordingly, this factor supports approval of the settlement.

3. The risk of maintaining class action status throughout the trial

As the parties observe, the proposed settlement "accords every Covered Employee in every state the right to participate in the claim procedure without regard to factual and legal idiosyncrasies in their claims." (*See* Motion at 9:4-5.) Because the instant class covers employees who worked in every state other than California, the Court agrees with the parties that "[g]iven the diverse law that surrounds overtime eligibility and wage deductions across the country," it was by no means certain that plaintiffs would have been able to obtain certification of "the wall-to-wall class that UBS is willing to accept for settlement purposes." (*See* Motion at 9:5-8.)

Accordingly, this factor supports approval of the settlement.

4. The amount offered in settlement

In determining whether the amount offered in settlement is fair, the Ninth Circuit has suggested that the Court compare the settlement amount to the parties' "estimates of the maximum amount of damages recoverable in a successful litigation." *See In re Mego Financial Corp. Securities Litigation*, 213 F.3d at 459. "[A] cash settlement amounting to only a fraction of the

potential recovery does not per se render the settlement inadequate or unfair," however. *See id.*

Here, the parties represented to the Court at the preliminary approval hearing that the amount of the settlement constituted approximately 25 to 35% of the amount of damages plaintiffs could have hoped to prove at trial. (*See* New York Attorney General Decl. Ex. 1 (Transcript of Aug. 11, 2006 preliminary approval hearing) at 13:1-14:5.) The parties provided support for that calculation at the January 19, 2007 final fairness hearing. The Court finds a settlement based on such percentage reasonable in light of the uncertainties involved in the litigation.

Accordingly, this factor supports approval of the settlement.

5. The extent of discovery completed and the stage of the proceedings

Here, no formal discovery took place prior to settlement. As the Ninth Circuit has observed, however, "[i]n the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement." *See In re Mego Financial Corp. Securities Litigation*, 213 F.3d at 459. In that regard, plaintiffs state that prior to mediation, plaintiffs' counsel "receiv[ed] informal discovery relating to the types and amounts of deductions taken by UBS, the months worked, and the

salaries of UBS financial advisors," as well as "the benefit of information and documents given to [counsel] by [ ] many current and former UBS brokers." (*See* McInerney Decl. ¶ 13.) In addition, plaintiffs' counsel attests, he "deposed a consultant for UBS regarding the methodology of gathering the data that was provided at the mediation" and "received absolutely no indication that any of the material provided by UBS was incorrect." (*See id.* ¶ 16.)

Accordingly, this factor supports approval of the settlement.

6. The experience and views of counsel

The settlement was negotiated and approved by experienced counsel on both sides of the litigation, with the assistance of a well-respected mediator with substantial experience in employment litigation. Accordingly, this factor supports approval of the settlement.

7. The presence of a governmental participant

One of the factors the Court may consider in evaluating the fairness of a settlement is "the presence of a governmental participant." *See Hanlon v. Chrysler Corp.*, 150 F.3d at 1026. The participation of a governmental entity "serves to protect the interest of the class members." *See Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977). There is no

indication that any governmental entity participated in the settlement of the instant action.

Accordingly, this factor favors neither approval nor disapproval of the settlement.

8. The reaction of the class members to the proposed settlement

On September 15, 2006, notice of the settlement was mailed to 13,176 class members. (*See* Holland Decl. ¶ 6.) As of January 4, 2007, the parties had received 6684 claim forms, representing approximately 51% of the total class members. (*See id.* ¶ 11.) The claim forms submitted seek compensation for a total of 241,609 qualified full or partial months worked during the class period, representing approximately 63% of a total of 386,271 qualified full or partial months worked by the class during the class period. (*See id.* 11.) The claims submitted seek payment of approximately $21,133,928 from the settlement fund. (*See id.*)

As of January 4, 2007, class members had submitted 280 requests to opt out of the settlement, representing an opt-out rate of approximately two percent. (*See id.* ¶¶ 16-18.) As noted above, timely objections to the settlement were submitted by eight class members and, as amicus, the New York Attorney General.

Appendix B

a. Objections by New York Attorney General

The objections of the New York Attorney General fall into three general categories. First, the New York Attorney General contends the settlement is unfair to New York class members because the recovery for each New York class member is less than the amount each California class member received in the settlement of the related action, *Bowman v. UBS*, C-04-3525. Second, the New York Attorney General objects to the requested attorney's fee award as excessive. Third, the New York Attorney General contends that the attorney's fee award provision of the settlement is contrary to Ninth Circuit authority as set forth in *Staton v. Boeing*, 327 F.3d 938 (9th Cir. 2003) and, as such, requires rejection of the settlement. The Court will address the New York Attorney General's substantive objections below, and will address its objections to the amount of fees sought in connection with class counsel's application for attorneys' fees.

i. Comparison to *Bowman* Settlement

The *Bowman* action, although addressing issues similar to those raised by the instant action, was an entirely separate and distinct case. In *Bowman*, a class of California stockbrokers, represented by different counsel than those representing the *Glass* plaintiffs, asserted claims under the FLSA and California law for unpaid overtime and improper wage deductions.

Bowman was settled before any of the three cases ultimately consolidated as the *Glass* action was filed.

Because *Bowman* and *Glass* are separate actions that were separately litigated and separately settled, any direct comparison of the *Bowman* and *Glass* settlements is unwarranted. Indeed, even if the two actions were otherwise indistinguishable, a settlement for a lesser amount nonetheless may constitute a fair, reasonable, and adequate compromise of the dispute. Settlements by their very nature are not intended to provide full compensation for the claimed losses and consequently cannot be calculated with the same precision as actual damages. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005) (noting existence of "range of reasonableness" with respect to any settlement).

Moreover, defendants have submitted a response to the New York Attorney General's amicus brief, setting forth in detail the reasons for their belief that their defenses to plaintiffs' claims are stronger under New York law than under California law and, accordingly, why defendants were willing to settle the California claims for a higher amount per class member. In response, the New York Attorney General now concedes there is a "major difference" between New York and California overtime laws and, in particular, that "it is significantly easier to meet the FLSA (and New York) administrative exemption, greatly increasing the risk that New York as compared with California brokers would be found exempt from overtime law." (*See* New York Attorney

General's Reply at 3:1-4.) Additionally, the New York Attorney General now acknowledges that "longer working hours in California . . . might explain a portion of the greater monetary recovery available in the *Bowman* settlement." (*See id.* at 4:12-13.) Although the New York Attorney General continues to take issue with defendants' arguments that California law on the wage deduction claims and availability of penalties is more favorable to plaintiffs than New York law, the Court finds the undisputed differences between California law and New York law with respect to the overtime claims suffices to justify the differences between the *Bowman* and *Glass* settlements.

Accordingly, the Court finds the differences between the *Bowman* and *Glass* settlements do not warrant rejection of the instant settlement.

ii. Attorney's Fees

As noted above, the New York Attorney General's objections to the amount of attorney's fees sought will be addressed below in connection with class counsel's motion for attorneys' fees.

iii. *Staton v. Boeing*

The New York Attorney General argues that the Ninth Circuit's opinion in *Staton v. Boeing* requires rejection of the proposed settlement. In particular, the New York Attorney General reads that decision to hold a settlement that provides for class counsel's seeking a

specified percentage of a common fund, with a reversion to the defendant of any portion of the requested amount not granted by the court, " 'allows too much leeway for lawyers representing a class to spurn a fair, adequate and reasonable settlement for their client in favor of inflated attorney's fees.' " (*See* Amicus Brief at 17:11-15 (quoting *Staton*, 327 F.3d at 969-70).

The language from *Staton* on which the New York Attorney General relies does not stand for the broad proposition asserted by the New York Attorney General. In *Staton*, the settlement therein at issue provided for an award of a fixed amount of attorneys' fees, which fees were not subject to court review. *See Staton*, 327 F.3d at 944-45; *see also id.* at 969 ("The parties negotiated the amount of attorneys' fees awarded as a term of the settlement agreement and thus conditioned the merits settlement upon judicial approval of the agreed-upon fees."). The Ninth Circuit found the lack of any provision for judicial review of the fees created a risk that class counsel would "spurn a fair, adequate and reasonable settlement for their clients in favor of inflated attorneys' fees," and held that "in order to obtain fees justified on a common fund basis, the class's lawyers must ordinarily petition the court for an award of fees, separate from and subsequent to settlement." *See id.* at 945.[3] Here,

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3. Although, as the New York Attorney General correctly notes, the Ninth Circuit described with approval a procedure by which the parties would agree to the amount of a common fund and provide for court determination of the amount of fees to be awarded from the fund, with distribution of the remainder

(Cont'd)

by contrast, the settlement expressly provides for a determination by the Court of the amount of fees to be awarded to class counsel. (*See* Amended Joint Stipulation of Settlement ¶ 29(a).) Although the settlement further provides that if the Court does not award the maximum amount of $11,250,000 in fees, the difference between that figure and the amount actually awarded will be returned to defendants, such provision does not conflict with *Staton;* the provision for court review of the amount of fees awarded adequately addresses the Ninth Circuit's concern that class counsel might negotiate "an excessive fee at the expense of the class." *See id.* at 972.

Accordingly, the Court finds *Staton* does not warrant rejection of the settlement.

b. Objections of Anderson, Arkwright, Wilwerding, and Gabriel

Class members Anderson, Arkwright, Wilwerding, and Gabriel do not object to any particular provision of the settlement. Rather, each objects to the filing of the *Glass* action in the first instance. In particular, Anderson states that he is "offended" by "Financial Advisers who sue to 'recover' overtime and business expenses when they knew full well how [the] industry's compensation

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(Cont'd)
"to the class rather than reverting to the defendant," *see id.* at 972, the Ninth Circuit stressed that such procedure was but one permissible alternative and that it did "not mean to preclude all others," *see id.* at 972 n. 22.

structure works"; he further states he wishes to "register [his] disgust at this lawsuit and settlement." (*See* Anderson Objection at 2.) Likewise, Arkwright expresses the opinion that the instant action "is shameful and disturbing" and contends that "[t]hc people involved in bringing this action should try to work, earn an honest living and do the right thing instead of sucking of[f] others like a leach." (*See* Arkwright Objection at 1 (emphasis deleted).) Wilwerding states that he "object[s] to the entire settlement" because the plaintiffs "were never promised any compensation for overtime when they hired on"; he further offers his opinion that the instant action "is a pure opportunistic case which [in] the end result does no more than hurt the investors whom we serve."[4] (*See* Wilwerding Objection at 1-2.) Gabriel states that the suggestion that "UBS somehow has mistreated [him] is an affront to both [his] own positive experiences and to the closely-guarded reputation of th[e] firm" and expresses the opinion that "all of the time and money wasted by this sorry lawsuit could have been deployed productively elsewhere by UBS and all involved." (*See* Gabriel Objection at 1-2.)

As each of the above-referenced objections challenges the filing of the lawsuit, and not the fairness of either the settlement as a whole or any particular provision thereof, such objections do not support rejection of the settlement. Anderson, Arkwright, Wilwerding, and Gabriel were free to opt out if they did not wish to participate in the instant litigation, and Wilwerding in fact did so.

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4. Wilwerding also expressly opted out of the instant action. (*See* Wilwerding Objection at 4.)

c. Objections of Pappous

Pappous objects to the allocation of settlement proceeds. In particular, Pappous argues that "the cost of [his] labor was just as much in Virginia as it was in New Jersey, Pennsylvania, or New York" and that there "is no justifiable methodology which allocates 60% more ($75 vs. $120) to the individuals who worked in" New Jersey, Pennsylvania and New York. (*See* Pappous Decl. at 1.)

The parties, however, do not purport to compensate class members from New Jersey, Pennsylvania, and New York at a higher rate because Financial Advisers in those states have higher salaries, but rather because their legal claims are more valuable in those states than the claims of class members in other jurisdictions.

Accordingly, Pappous's objection does not warrant rejection of the settlement.

d. Objections of Cintron

Cintron asserts two objections to the proposed settlement. At the outset, Cintron argues that the settlement fails to compensate him for the actual amount of overtime he worked. Cintron misunderstands the purpose of the settlement, which is not to provide full compensation for all overtime hours each class member worked, but to compensate class members for the value of their legal claims to overtime pay. As the parties point out, the recent Opinion Letter from the Department of

Appendix B

Labor provides support for UBS's contention that class members' are unlikely to be able to prove their entitlement to any overtime pay under the FLSA. The Court finds this objection does not warrant rejection of the settlement. Additionally, Cintron objects to the amount of attorneys' fees sought by plaintiffs' counsel. The Court will address such objection below in connection with class counsel's motion for attorney's fees.

e. Objections of Bavishi

Although Bavishi has submitted objections to the settlement, he also has opted out. (*See* Holland Decl. ¶ 23 and Ex. A.) Consequently, as Bavishi is no longer a class member, he has no standing to object.[5] *See* Fed.R.Civ.P. 23(e)(4)(A) (providing "any class member may object to a proposed settlement"); *Mayfield v. Barr*, 985 F.2d 1090 (D.C.Cir.1993) (holding "[t]hose who are not class members, because they are outside the definition of the class or have opted out" lack standing to object to class settlement); *Jenson v.*

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5. On January 17, 2007, Bavishi filed a motion to opt back into the settlement. Because Bavishi, by such motion, seeks to assert an untimely claim, and because the settlement provides that the claims administrator "will perform the duties of . . . resolving any disputes regarding claims by the Class Members" and will "timely notify class claimants whose claims are untimely or denied for other reasons," (*see* Amended Joint Stipulation of Settlement ¶¶ 3, 46), Bavishi's motion is hereby DENIED without prejudice to his making such request of the claims administrator.

Continental Finance Corp., 591 F.2d 477, 482 n. 7 (8th Cir. 1979) ("Opt-outs . . . are not members of the class and hence are not entitled to the protection of Rule 23(e).").

Accordingly, the Court does not consider Bavishi's objections.[6]

f. Objections of Evans

Evans has submitted numerous objections to the settlement and to the amount of attorneys' fees sought by class counsel. The Court first will address Evans's substantive objections, and thereafter, in discussing class counsel's application for fees, will address Evans's objections to the amount of fees.

i. Damages Analysis

Evans's first objection is that the parties have provided no analysis of the value of the class's claims. Evans contends that the parties "should be able to provide the Court and class members with information on the monetary value of: (a) the class's 'unpaid overtime' claims; (b) the class's 'unreimbursed business-related expenses' claims; (c) the class's 'improper

6. The Court further notes that Bavishi's objections relate to (1) issues that are not the subject of the class claims and (2) Bavishi's misunderstanding of class action litigation procedures, and, consequently, would not require rejection of the settlement even if the Court were to consider such objections.

training error deduction' claims; and (d) the class's claims for 'interest and penalties.' " (*See* Evans Objection at 4:23-5:1.) Evans contends that without such information, the Court cannot make a rational determination as to whether the amount of the settlement is fair, reasonable, and adequate.

At the August 11, 2006 hearing on the parties' motion for preliminary approval of the settlement, the Court noted that because the parties had failed to provide an estimate of the actual losses claimed by the class members, the Court had no way of determining whether the amount of the settlement was acceptable. (*See* New York Attorney General Decl. Ex. 1 at 11:25-12:22.) As the parties note, they have represented to the Court that the settlement constitutes approximately 25 to 35% of the estimated actual loss. (*See id.* at 14:2-3.) At the final fairness hearing, the parties presented a lengthy discussion of the above-referenced estimate, in which they represented that their estimate of the maximum loss to the class was based on hard data obtained from interviews with class members, computer log-in records, and payroll records. The Court is satisfied that the parties had a reasonable factual basis for their estimate that the $45,000,000 settlement represented, at a minimum, 25 to 35% of the loss to the class.

Accordingly, the Court finds the amount of the settlement was fair, reasonable, and adequate, and that the parties' failure to provide a detailed written analysis of the value of the claims does not warrant rejection of the settlement.

ii. Legal Analysis

Evans's next objection is that the parties have failed to "provide a detailed assessment of each theory of liability and the evidence and the law that would support or refute that theory." (*See* Evans Objection at 6:13-15 (internal quotation and citation omitted).) To the extent the parties are required to do so, the Court finds their various memoranda filed with this Court and with Judge Legge, as well as their presentation at the final fairness hearing, adequately set forth a legal and factual analysis of the claims.

iii. Adequacy of Class Representatives

Evans next argues that because each of the named plaintiffs is a former employee of defendants, the named plaintiffs might not be adequate representatives of a class that includes both current and former UBS employees. In particular, Evans notes that the settlement contains no statement as to whether any UBS policies will be changed with respect to class members who are current employees, a matter in which, as Evans observes, former employees have no interest.

Rule 23(a)(4) provides that a class action may be maintained only if "the representative parties will fairly and adequately protect the interests of the class." *See* Fed. R. Civ. P. 23(a)(4). "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to

represent." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 (1997); *see also Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978) (describing "two criteria for determining the adequacy of representation"; "[f]irst, the named representatives must appear able to prosecute the action vigorously through qualified counsel, and second, the representatives must not have antagonistic or conflicting interests with the unnamed members of the class"). As the parties observe, there is no conflict between the named plaintiffs and class members who are current employees of defendants. Both former and current employees are equally interested in obtaining compensation for the assertedly unlawful practices set forth in the complaint. The fact that, in any given case, some of the class members may have potential claims in addition to those raised by the named plaintiffs does not necessarily create a conflict of interest between the named plaintiffs and such class members.

Here, the purpose of the instant settlement is to provide compensation for assertedly unlawful practices occurring during the class period. Notably, the settlement provides for a release only of claims "arising during the Class Members' Released Period," which ends on the date of final approval of the settlement, (*see* Amended Joint Stipulation of Settlement ¶¶ 8, 48-49), and, thus, does not preclude any class member from filing suit against UBS for any future violation of the law. Consequently, if any class member is of the view

that defendants' ongoing policies are unlawful, they remain free to challenge such policies in a future lawsuit.[7]

Accordingly, the Court finds the lack of provision for changes in defendants' policies does not warrant rejection of the settlement.

iv. Allocation of Settlement Fund and Objections to Appointment of Judge Legge as Master

Evans next argues that the parties have not provided an adequate explanation for the allocation of settlement funds among the class members, in particular, the larger distribution to class members who worked in New York, New Jersey, and Pennsylvania as compared with the distribution to class members who worked in other states.

As noted, the Court, at the parties' request, appointed Judge Legge as special master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, "to hear and determine whether the allocation formula in the settlement is fair, reasonable and adequate in light of any timely challenges to that allocation." (*See* Order Appointing the Honorable Charles Legge as Master Pursuant to the Stipulation of Parties, filed Dec. 7, 2006.)

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7. The Court further notes that class counsel, in both their fees motion and at the final hearing, represented that defendants have agreed to implement certain policy changes. (*See* Fees Motion at 2:27-3:15.)

The parties thereafter submitted extensive briefing on the matter to Judge Legge, and Evans filed a supplemental objection raising concerns about the manner in which Judge Legge was appointed as master. (*See* Supplemental Objection of Plaintiff Class Member/ Objector Marty Evans, filed December 21, 2006.)

On January 12, 2007, Judge Legge issued a "Report, Findings and Recommendations of the Master," in which he recommended this Court find "that the procedures for the appointment of the Master substantially complied with the requirements of Rule 53; were fair, adequate and reasonable; and that the Master has been duly appointed under Rule 53 with jurisdiction over the issue referred to him." (*See* Report, Findings, and Recommendations of the Master, filed January 12, 2007, at 3.) Judge Legge further recommended that "[t]he allocation formula . . . be found to be fair, reasonable, and adequate." (*See id.* at 9.)

(1) Objections to Appointment of Judge Legge

Evans stresses that his objection to the appointment of Judge Legge "relates to procedural irregularities surrounding the Order of appointment and has nothing to do with Judge Legge's qualifications to serve as special master." In particular, Evans contends, the order appointing Judge Legge did not comply with all of the requirements of Rule 53. In their motion for final approval, the parties do not address Evans's objections to the order appointing Judge Legge.

Appendix B

As Evans points out, an order appointing a master pursuant to Rule 53 "must state" *inter alia*, (1) "the circumstances—if any—in which the master may communicate ex parte with the court or a party"; (2) "the nature of the materials to be preserved and filed as the record of the master's activities"; and (3) "the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations." *See* Fed. R. Civ. P. 53(b)(2). Although Evans correctly observes that the proposed order submitted by the parties and signed by Court fails to expressly set forth all of the above-referenced information, the Court, for the following reasons, agrees with Judge Legge that the order is in substantial compliance with Rule 53(b)(2). First, the Court has not communicated ex parte with Judge Legge, nor is it aware of any ex parte communications between Judge Legge and any party. Moreover, the Court is confident that Judge Legge, as a former federal judge, is well aware of the need to avoid ex parte communications absent specific authorization. Second, the order authorizes Judge Legge to "preserve any . . . testimony or evidence"; all materials submitted to Judge Legge, as well as the transcript of the hearing before him, have been made part of the record in the instant action. Third, the order expressly provides that the Court could "adopt Judge Legge's findings or revisit them at the January 19, 2007 hearing," (*see* Stipulated Appointment Order at 2:22-23), and thus establishes the time limits and procedure by which the Court would review Judge Legge's findings. Although the order does not expressly set forth the applicable standards for

review of Judge Legge's findings, those standards are provided in Rule 53 itself. Because the parties did not stipulate that Judge Legge's findings of fact would be either "reviewed for clear error" or "final," the Court must review any such findings of fact de novo. *See* Fed. R. Civ. P. 53(g)(3). The Court also must review de novo all findings of law. *See* Fed. R. Civ. P. 53(g)(4). The Court may set aside any ruling on "a procedural matter only for an abuse of discretion." *See* Fed. R. Civ. P. 53(g)(5).

Evans further objects that he was not given an opportunity to be heard prior to the Court's appointment of Judge Legge as master. Rule 53(b)(1) requires a court to "give the parties notice and an opportunity to be heard before appointing a master"; Rule 53(a)(1) permits a court to appoint a master only to "perform duties consented to by the parties." *See* Fed. R. Civ. P. 53(a)(1), (b)(1). Here, plaintiffs and defendants expressly consented to the appointment of Judge Legge. Evans cites no authority requiring class counsel to obtain the consent of all members of the class prior to agreeing to the appointment of a master.

Finally, Evans notes that Rule 53 permits any party to file objections to a master's findings and that, accordingly, he and the other objectors to the settlement should be permitted to file objections to Judge Legge's findings. In particular, Rule 53(g)(2) provides that any "party may file objections to-or a motion to adopt or modify—the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are

served, unless the court sets a different time." *See* Fed.R.Civ.P. 53(g)(2). Assuming, *arguendo,* the individual class members have such a right separate from class counsel, here, the Court did "set[ ] a different time," by providing that Judge Legge's findings could be "revisit [ed]" at the January 19, 2007 fairness hearing. To date, no objections to Judge Legge's findings have been filed, and none were raised at the final fairness hearing.

Accordingly, the Court finds Evans's procedural objections to the order appointing Judge Legge provide no basis for rejecting the proposed settlement.

(2) Objections to Allocation of Settlement Fund

Evans objects that the parties have not provided the Court with "specific information on how the formula for allotting settlement benefits was developed"; in particular, Evans contends, the increased payout for class members who worked in New York, New Jersey, and Pennsylvania appears to be based on speculation.

Subsequent to the date of Evans's objections, the parties filed detailed briefing on this issue with Judge Legge, explaining that although the value of the class overtime claims is fairly consistent throughout all jurisdictions (with the exception of California), the value of the unlawful deductions claims differs significantly between two groups of states. In the first group, which defendant describes as the "freedom to contract states"

and which include the "vast majority" of the jurisdictions at issue in the instant settlement, courts "typically sustain reimbursement agreements between employers and employees, contracts defining wages, and/or contracts permitting wage deductions." (*See* Defendants' memorandum to Judge Legge at 6:23-7:3.) According to defendants, their liability in "freedom to contract" states is "non-existent or less than its exposure in other states." (*See id.* at 7:12-13.) In the second group, consisting of New York, New Jersey, and Pennsylvania, the law, according to defendants, is not as clear with respect to the propriety of the deductions at issue. Accordingly, "[t]o account for the parties' greater uncertainty regarding the likely outcome of Class Member's deductions in these three states, [the parties] agreed to allocate a larger portion of the Settlement proceeds to Class Members in New York, New Jersey, and Pennsylvania." (*See id.* at 7:25-8:3.)

Judge Legge, in his January 12, 2007 Report, concluded that the allocation formula is fair, reasonable, and adequate. Having reviewed de novo the memoranda submitted to Judge Legge, as well as the transcript of the January 4, 2007 hearing before Judge Legge, the Court agrees that the parties have set forth a reasoned basis for treating claimants employed in New York, New Jersey, and Pennsylvania differently from claimants employed in other jurisdictions.

Accordingly, the Court finds Evans's objections to the allocation formula do not warrant rejection of the settlement.

Appendix B

v. Separate Settlements in *Bowman* and *Glass*

Evans next argues that the parties have failed to adequately explain why *Bowman* and *Glass* were filed as separate actions and, consequently, why California employees are not part of the *Glass* settlement. As discussed above, *Bowman* and *Glass* were filed at separate times by separate counsel. Moreover, *Bowman* was filed and settled prior to the filing of any of the actions that ultimately were consolidated in *Glass*.

Accordingly, this objection does not warrant rejection of the instant settlement.

vi. Claims Administration

Evans's next objection is that the settlement grants the claims administrator the final word in resolving disputes over claims to the settlement fund. In particular, the settlement provides that the claims administrator "will perform the duties of . . . notifying the Parties of and resolving any disputes regarding claims by the Class Members." (*See* Amended Joint Stipulation of Settlement at 3 ¶ 3.) Evans contends the settlement should be amended to grant the class members the right to petition the Court in the event of a dispute as to the manner in which a claim is resolved by the claims administrator.

The parties, in response, argue that the resolution of claims disputes is not complex, and that Rust

Consulting, Inc. ("Rust"), the claims administrator, is an experienced neutral evaluator who is capable of reaching a fair resolution. Consequently, the parties argue, adding court review to the process "would delay the Settlement for no ascertainable purpose." (*See* Motion at 17:12-25.)[8] Evans has submitted no evidence calling into question Rust's ability to resolve in a fair manner disputes as to claims, and has submitted no authority requiring the Court to resolve any such disputes.

Accordingly, this objection does not warrant rejection of the settlement.[9]

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8. David Holland ("Holland"), Principal Consultant for Rust Consulting, Inc., attests that as of January 4, 2007, he has received 482 claim forms that dispute the employment history provided to class members on their claim forms. (*See* Holland Decl. ¶ 20.) The settlement provides that any such disputes shall be resolved by the claims administrator if the parties are unable to reach an agreement as to their resolution. (*See* Amended Joint Stipulation of Settlement ¶ 44.)

9. Evans also objects that, although the Settlement provides for a reasonable payment for the services of the claims administrator, no information about such cost has been provided. Holland has since attested, in his declaration filed January 4, 2007, that "[t]he total estimated cost for the administration of this Settlement, including fees incurred and future costs for completion of the administration, is $182,847.90." (*See* Holland Decl. ¶ 24.)

vii. Joseph Glass NASD Arbitration

Evans's final objection to the settlement is that the parties have provided no information about named plaintiff Joseph Glass's claims in NASD arbitration No. 04-04995. Evans contends such information is "needed to ensure that there is nothing about . . . Glass's NASD claims that would affect his ability to adequately represent the class." (*See* Evans Objections at 11:12-17.) In response, the parties represent that Glass's arbitration "does not encompass any overtime or wage deduction claims and is entirely irrelevant to th[e] Settlement." (*See* Joint Motion at 15 n. 11.) At the final fairness hearing, the parties informed the Court that the subject of the NASD arbitration was race and age discrimination. No evidence has been presented to the contrary.

Accordingly, this objection does not warrant rejection of the settlement.

g. Conclusion

For the reasons set forth above, the Court finds the proposed settlement is fair, reasonable, and adequate, and will GRANT the parties' joint motion for approval thereof.

Appendix B

B. Motion for Attorneys' Fees, Costs and Class Representative Enhancements

Class counsel moves for an award of fees and costs in the amount of $11,250,000, as well as a $25,000 payment to each of the four named plaintiffs. As noted, the settlement provides for a maximum payment of "up to $11,250,000.00 in attorney' fees and litigation costs to Class Counsel, subject to Court approval" as well as "a pool of up to $100,000.00 in enhancements to be divided among the Class Representatives, subject to Court approval." (*See* Amended Joint Stipulation of Settlement ¶ 29(a).)

1. Fees and Costs

a. Legal Standard

"Under the 'common fund' doctrine, 'a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.' " *See Staton*, 327 F.3d at 967 (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980)). " 'The doctrine rests on the presumption that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.' " *Id.* (quoting *Boeing*, 444 U.S. at 478). Under the common fund doctrine, the Court may assess "attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.' " *See id.* (quoting *Boeing*, 444 U.S. at 478).

Appendix B

Under the common fund doctrine, the Court may award fees by using either the percentage-of-the fund method or the lodestar method, and "no presumption in favor of either the percentage or the lodestar method encumbers the district court's discretion to choose one or the other." *See In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1296 (9th Cir.1994). "As always, when determining attorneys' fees, the district court should be guided by the fundamental principle that fee awards out of common funds be ' *reasonable under the circumstances.*' " *Id.* (quoting *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir. 1990) (emphasis in original)).

The Ninth Circuit has repeatedly held that 25% of the gross settlement amount is the benchmark for attorneys' fees awarded under the percentage method and that if the Court departs from that benchmark, the record must indicate the Court's reasons for doing so. *See, e.g., Powers v. Eichen*, 229 F.3d 1249, 1256-57 (9th Cir.2000). "The benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *See Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990).

b. Discussion

Class members Cintron and Evans, as well as the New York Attorney General, have filed objections to the amount of attorneys' fees and costs sought by class counsel. Cintron objects that the amount of attorneys' fees and costs sought "is disproportionate and ridiculous." (*See* Cintron Objection at 1.) The New York Attorney General argues that the fees sought are "unreasonable" in light of "the minimal work required from plaintiffs' counsel and the insignificant risk of non-recovery which they ran," and suggests that, under the circumstances, an award based on the lodestar would be more appropriate. (*See* Amicus Curiae Memorandum of New York Attorney General at 15-16.) Evans contends the Court should conduct a "lodestar cross-check" against class counsel's request for $11,250,000 in fees and costs.[10] (*See* Evans Objection at 12.)

The Ninth Circuit has held that the Court may, but is not required to, compare the lodestar and the 25% benchmark to determine if the 25% benchmark results in an inappropriately high or low fee. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050-51 (9th Cir.2002) (observing that calculation of lodestar provides check on reasonableness of percentage award; affirming

10. Evans's additional objection, that class counsel has not documented the actual costs incurred, has been addressed by the declaration of class counsel, filed January 5, 2007, attesting that class counsel have incurred actual expenses in the total amount of $56,924.07, and providing a summary thereof. (*See* McInerney Decl. ¶ 19 and Ex. F.)

district court's conclusion that fee award of 28% of fund and 3.65 times lodestar amount was reasonable); *Fischel v. Equitable Life Assurance Society of the United States*, 307 F.3d at 1001, 1007 (9th Cir. 2002) (finding no error where district court awarded fees under lodestar method and failed to compare lodestar with 25% benchmark).

In the instant action, although class counsel has not provided the Court with information from which the Court could calculate the lodestar, there can be no doubt that the lodestar would result in a fee substantially lower than the $11,250,000 claimed. The dockets for the three cases that ultimately were consolidated in the *Glass* action show no litigation activity of substance other than the filing of the complaints. (*See* New York Attorney General Decl. E's. 10, 12, 17.) Additionally, because the instant settlement was reached prior to the filing of the *Glass* action, in which those three cases were consolidated, there was no litigation in this Court prior to settlement. Since that time, however, a considerable number of filings on behalf of the plaintiff class have been made and, of course, those filings do not necessarily reflect all the hours spent by class counsel out of court. Nevertheless, the Court would not expect those out-of-court hours to affect the lodestar to the extent of producing a fee as high as that claimed herein under the percentage method.

The early settlement of the instant action resulted in significant benefit to the class, however. In light of the recent Opinion Letter of the Department of Labor,

issued November 27, 2006, defendants likely would not agree to as large a settlement, or, indeed, any settlement, if the parties were attempting to negotiate a settlement today. Class counsel expressly recognized the negative impact an opinion letter could have on the instant litigation well before the November 27, 2006 Opinion Letter was issued. (*See, e.g.*, Plaintiff's Opposition to Lawrence R. Kaufmann's Motion to Intervene, filed Oct. 27, 2006, at 3-4 (noting "[t]he whole idea that stockbrokers can recover for improper wage deductions or sue for overtime is clearly a novel one . . . [and] a new opinion letter could end this genre as quickly as it did a few years ago when the Department of Labor wrote that insurance adjusters were exempt from overtime").) Class counsel achieved an excellent result for the class members by settling the instant action promptly.

Although the Ninth Circuit has noted that where an action is settled quickly after the action is filed, "the lodestar calculation may convince a court that a lower percentage [than the 25% benchmark] is reasonable," it also has explained that it did "not mean to imply that class counsel should necessarily receive a lesser fee for settling a case quickly." *See Vizcaino*, 290 F.3d at 1050 and n. 5. Indeed, as the Ninth Circuit has observed, "it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement." *See id.* at 1050 n. 5.

Moreover, the Ninth Circuit has held the "relevant circumstances" that could justify an *upward* departure from the 25 percent benchmark include the achievement of "exceptional results" for the class. *See Vizcaino*, 290 F.3d at 1048 (affirming fee award of 28 percent of settlement fund). Under the circumstances presented here, where the early settlement resulted in a significant benefit to the class, the Court finds no need to conduct a lodestar cross-check.[11] Class counsel's prompt action in negotiating a settlement while the state of the law remained uncertain should be fully rewarded.

The New York Attorney General and Evans further argue that even if fees are awarded under the percentage method, the Court should base such fees on the amount of the settlement fund actually claimed by the class. The Ninth Circuit has held, however, that the district court must award fees as a percentage of the entire fund, or pursuant to the lodestar method, not on the basis of the amount of the fund actually claimed by the class. *See Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). Contrary to Evans' argument, the Court finds inapplicable the Class Action Fairness Act's provision that "any attorney's fee award to class counsel that is attributable to the award of . . . coupons shall be based on the value to

11. Consequently, the Court also rejects Evans's argument that because the class notice states defendants will not challenge the amount of fees sought by class counsel, (*see* Class Notice at 5 ¶ J), the Court must permit Evans to review class counsel's time records.

class members of the coupons that are redeemed." *See* 28 U.S.C. § 1712(a). That statute, on its face, does not apply to non-coupon settlements.

Accordingly, the Court finds the benchmark of 25% of the settlement is reasonable under the circumstances presented herein.

2. Enhancements

Class counsel requests that the Court award a $25,000 enhancement to each of the four class representatives for their assistance in the instant litigation. As noted, the settlement provides for "a pool of up to $100,000.00 in enhancements to be divided among the Class Representatives, subject to Court approval." (*See* Amended Joint Stipulation of Settlement ¶ 29(a).)

Evans objects to payment of such enhancements, relying on a statement in the Committee Report on the Private Securities Litigation Act of 1995 ("PSLRA") that "lead plaintiffs are not entitled to a bounty for their service." (*See id.; see also* 15 U.S.C. § 78u-4(a)(4) ("The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class.").) The instant action is not an action brought pursuant to the PSLRA, however, and, consequently, is not subject to the PSLRA's ban on enhancements to lead plaintiffs. Where the PSLRA does

not apply, the issue of "[w]hether to award [a lead plaintiff] for his efforts is within the Court's discretion." *See Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294 (N.D.Cal.1995).

Evans further objects that the payments sought are "excessive" and that such payments "should be based on declarations filed by each proposed recipient, describing the services he performed on behalf of the class." (*See* Evans Objection at 21.) Class counsel has filed a declaration attesting that the named plaintiffs "provided a great deal of informal discovery to Class Counsel and a great deal of insight into the policies and practices of UBS," (*see* McInerney Decl. ¶ 20), and provided additional relevant detail at the final fairness hearing. Class counsel further attests that "these four individuals, all of whom are still currently employed in the securities industry, placed something at risk by putting their names on a complaint against one of the largest brokerage houses in America." (*See id.*) The Court finds such representations, although not as detailed a showing as Evans asserts is necessary, are sufficient to support approval of the requested enhancements.

Accordingly, the Court finds the requested payment of $25,000 to each of the named plaintiffs is appropriate.

Appendix B

CONCLUSION

For the reasons set forth above,

1. The parties' joint motion for final approval of settlement is hereby GRANTED.

2. Class counsel's application for attorney's fees, costs, and class representative enhancements is hereby GRANTED.

IT IS SO ORDERED.

Dated: January 26, 2007

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

APPENDIX C — ORDER DENYING ANTHONY D'ARIA'S MOTION TO INTERVENE; VACATING HEARING OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED JANUARY 17, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

No. C-06-4068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

ORDER DENYING ANTHONY D'ARIA'S MOTION TO INTERVENE; VACATING HEARING

(Docket No. 130)

Before the Court is class member Anthony D'Aria's ("D'Aria") motion, filed December 15, 2006, to intervene in the instant action, pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. Plaintiffs and defendants have filed separate oppositions to the motion; D'Aria has filed a reply, and, with the Court's

permission, plaintiffs and defendants have filed separate surreplies. Having considered the papers filed in support of and in opposition to the motion, the Court finds the matter appropriate for decision without oral argument, *see* Civil L.R. 7-1(b), hereby VACATES the January 19, 2006 hearing on the motion, and rules as follows.

BACKGROUND

The instant class action is asserted on behalf of a class consisting of all persons who, at any time during the applicable statute of limitations, are or were employed as stockbrokers at any of the brokerage offices of UBS Financial Services Inc. or its predecessors, UBS Paine Webber and Paine Webber Group Inc., anywhere in the United States or its territories, excluding California. (*See* Compl. ¶ 1.) On July 28, 2006, the parties filed a joint motion for preliminary approval of a proposed settlement. On August 25, 2006, the Court granted preliminary approval of the settlement and set a fairness hearing for January 19, 2007. Pursuant to the Class Notice, any request to opt out of the settlement and any objections to the settlement were required to be submitted no later than November 14, 2006. (*See* Class Notice at 7 ¶¶ C and D.)

On October 13, 2006, class member Lawrence Kaufmann ("Kaufmann") filed a motion to intervene in the instant action for purposes of obtaining an order rejecting the proposed settlement, consolidating the instant action with *Bowman v. UBS*, C-04-3525 MMC, discharging current counsel for the *Bowman* and *Glass*

plaintiffs, and appointing Kaufmann's counsel to represent the *Bowman* and *Glass* classes. On November 14, 2006, Kaufmann withdrew his motion to intervene.

On November 16, 2006, the Court issued an order in which the Court noted Kaufmann's motion contained objections to the proposed settlement, and invited the parties to file memoranda addressing whether Kaufmann should be permitted to withdraw his objections pursuant to Rule 23(e)(4)(B) of the Federal Rules of Civil Procedure.

D'Aria did not file a timely objection to the settlement. Nonetheless, on November 16, 2006, D'Aria filed a motion to substitute himself for Kaufmann and to adopt Kaufmann's motion to intervene. That same date, the Court issued an order denying D'Aria's motion.

On November 17, 2006, the Court held a fairness hearing in the *Bowman* action and granted final approval of the *Bowman* settlement.

On December 1, 2006, plaintiff, defendants, and D'Aria filed memoranda addressing whether the Court should permit Kaufmann to withdraw his objections to the proposed settlement. Thereafter, plaintiffs and defendants filed separate motions to strike D'Aria's memorandum; by separate order filed concurrently herewith, the Court has granted those motions.

On December 15, 2006, D'Aria filed the instant motion to intervene in the *Glass* action.

Appendix C

DISCUSSION

D'Aria seeks leave to intervene as a matter of right, pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure; he does not seek to intervene permissively, pursuant to Rule 24(b). D'Aria contends his interests and the interests of the class have not been adequately represented by plaintiffs and their counsel; he seeks to intervene for the purposes of (1) objecting to the proposed settlement; (2) replacing plaintiffs' counsel with his own counsel or, alternatively, appointing his own counsel as co-counsel with plaintiffs' current counsel; (3) obtaining discovery as to "the circumstances under which the *Glass* action was prosecuted and settled" and the circumstances under which Kaufmann withdrew his objection and motion to intervene; and (4) litigating the action to trial or attempting to negotiate a new settlement.

A. Intervention As Matter Of Right

"Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *See* Fed. R. Civ. P. 24(a). Where, as here, the applicant

seeks to intervene as of right, and in the absence of a federal statute conferring an unconditional right to intervene, the applicant must "demonstrate that (1)[he] has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect [his] interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest." *See United States v. Alisal Water Corporation*, 370 F.3d 915, 919 (9th Cir. 2004) (internal quotation and citation omitted). "The party seeking to intervene bears the burden of showing that *all* the requirements for intervention have been met." *Id.* (emphasis in original).

1. Significant Protectable Interest Related to Subject of Action

"An applicant for intervention has a significantly protectable interest if the interest is protected by law and there is a relationship between the legally protected interest and the plaintiff's claims." *See Alisal*, 370 F.3d at 919. "An applicant generally satisfies the 'relationship' requirement only if the resolution of the plaintiff's claims actually will affect the applicant." *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998).

As D'Aria is a member of the *Glass* class, he has a significant protectable interest relating to the subject of the instant action. *See, e.g., In re Community Bank of Northern Virginia Mortgage Loan Litigation*, 418 F.3d 277, 314 (3d Cir.2005) (finding when unnamed class

member seeks to intervene in class action, significant protectable interest factor "is satisfied by the very nature of class action litigation"). No argument to the contrary has been submitted.

Accordingly, the Court finds D'Aria has demonstrated a significant protectable interest in the instant litigation.

2. Impairment of Applicant's Ability to Protect His Interest

The next issue is whether "the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect [his] interest." *See Alisal*, 370 F.3d at 919.

Defendants argue that D'Aria's interests will not be impaired as a result of the instant settlement because D'Aria was free to opt out of the settlement and to assert, by means of a separate action, any claims he wished to pursue against defendants. *See, e.g., Hawaii-Pacific Venture Capital Corp. v. Rothbard*, 564 F.2d 1343, 1346 (9th Cir. 1977). In *Hawaii-Pacific*, the Ninth Circuit affirmed the district court's denial of a motion to intervene because, *inter alia*, the moving class members, who had not received notice of the settlement and arguably were not bound thereby, could "pursue[ ] their individual claims in independent actions" and thus did not "sustain[ ] their burden of proving impairment or impediment to their ability to protect their interest." *See id.*

Here, however, D'Aria received timely notice of the proposed settlement, D'Aria has not opted out, and the November 14, 2006 deadline to opt out of the settlement has passed. Because D'Aria has not opted out of the class settlement, and the deadline to do so has passed, the Court finds D'Aria has demonstrated the disposition of the instant action may impair or impede his ability to protect his interest in the claims constituting the subject of the instant litigation.[1]

3. Timeliness

The third factor, as noted, is whether the motion to intervene is timely. *See Alisal*, 370 F.3d at 919. Timeliness "is a flexible concept"; "[a]lthough delay can strongly weigh against intervention, the mere lapse of

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1. Moreover, as D'Aria observes, the Ninth Circuit has stated, albeit in a footnote, that where a motion to intervene is timely, a class member "should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court," thus suggesting that members of a class, by their very nature, meet the first two requirements for intervention as a matter of right. *See Diaz v. Trust Territory of the Pacific Islands*, 876 F.2d 1401, 1405 n. 1 (9th Cir. 1989) (internal quotation and citation omitted); *see also Community Bank*, 418 F.3d at 314 (holding when class members "seek intervention as a matter of right, the gravamen of a court's analysis must be on the timeliness of the motion to intervene and on the adequacy of representation," because the "interest" and "impairment" requirements of Rule 24(a)(2) "are satisfied by the very nature of Rule 23 representative litigation"). The Court considers the question of timeliness *infra*.

time, without more, is not necessarily a bar to intervention." *See id.* at 921. Generally, in determining whether a motion to intervene is timely, courts weigh the following factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to the other parties; and (3) the reason for and length of the delay." *See id.* Where a proposed intervenor seeks to intervene for purposes of objecting to a proposed settlement, timeliness generally is measured from the date the proposed intervenor received notice that the proposed settlement was contrary to its interest. *See United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002) (finding motion to intervene timely where proposed intervenors "acted as soon as they had notice that the proposed settlement was contrary to their interests"); *see also Community Bank*, 418 F.3d at 314 (finding motion to intervene "presumptively timely" where filed before deadline to opt out of class settlement).

Here, notice of the proposed settlement was mailed to class members on September 15, 2006. (*See* Holland Decl. ¶ 7.) On September 22, 2006, D'Aria signed a "Consent to Join Settlement" form, by which he "consent[ed] to be a party plaintiff" in the instant action and "authorize[d] Class Counsel to act on his . . . behalf in all matters relating to this action, including the settlement of his . . . claims"; he also submitted a claim form, seeking his share of the settlement proceeds. (*See* McInerney Decl. Exs. 1 and 2.) D'Aria attests that "beginning in early to mid-September, 2006, and continuing in October, 2006," he had discussions with

his counsel about the instant action and the proposed settlement. (*See* D'Aria Decl. ¶ 3.) Although D'Aria thus concedes he was notified of the proposed settlement and discussed it with counsel, he nonetheless failed to file an objection to the settlement prior to the November 14, 2006 deadline. The instant motion to intervene was filed December 15, 2006, more than a month after the deadline for class members to opt out of the settlement.

a. First Factor

The first factor in the timeliness analysis is "the stage of the proceeding at which an applicant seeks to intervene." *See Alisal,* 370 F.3d at 921. The Ninth Circuit has held that a proposed intervenor is not necessarily untimely merely because the motion to intervene is filed after a significant amount of time and effort has been expended in accomplishing a settlement. *See Carpenter,* 298 F.3d at 1125 (holding motion to intervene timely where proposed intervenors filed "as soon as they had notice" of settlement's terms).

Here, however, D'Aria concedes he received timely notice of the proposed settlement yet failed to file a timely objection thereto. Rather, as noted, he submitted, on September 22, 2006, a "Consent to Join Settlement" form, as well as a claim for his share of the settlement proceeds. (*See* McInerney Decl. Exs. 1 and 2.) Indeed, after receiving notice of the settlement, D'Aria waited nearly three months before moving to intervene, until the last possible date, resulting in his motion being heard on the same date as the final fairness hearing.

Appendix C

The primary purpose of the Court's setting a deadline for class members to file objections to a proposed settlement is to avoid the disruption caused by motions such as the instant motion to intervene. Accordingly, the Court finds the stage of the proceedings at which D'Aria seeks to intervene weighs against a finding of timeliness.

b. Second Factor

As noted, the second factor in the timeliness analysis is "the prejudice to the other parties." *See Alisal*, 370 F.3d at 921. Here, as plaintiffs correctly point out, D'Aria's intervention and the subsequent reopening of the litigation "could be disastrous to the [class member] brokers," because a recently issued Opinion Letter by the Department of Labor casts significant doubt on the strength of their claims. (*See* Plaintiffs' Opp. at 15.)

Plaintiffs in the instant action seek recovery of overtime pay and assertedly improper wage deductions on behalf of a class of stockbrokers, under the federal Fair Labor Standards Act ("FLSA") and state law. The FLSA contains various exceptions to its requirement that employers pay their employees time and a half for work in excess of 40 hours per week, including, in particular, an exemption for "any employee employed in a bona fide . . . administrative . . . capacity." *See In re Farmers Insurance Exchange*, 466 F.3d 853, 858-59 (9th Cir. 2006); *see also* 29 U.S.C. § 213(a)(1). On November 27, 2006, months after the proposed *Glass* settlement was negotiated, the Department of Labor issued an

Appendix C

Opinion Letter stating stockbrokers meet the requirements of the "administrative exemption" to the FLSA and, thus, are not entitled to overtime under the FLSA. (*See* McInerney Decl. Ex. 9 at 8.) Courts "must give deference to the DOL's interpretation of its own regulations through, for example, Opinion Letters." *See Farmers*, 466 F.3d at 860.

As a result of the issuance of the November 27, 2006 Opinion Letter, plaintiffs' federal overtime claims are significantly weakened. It is likely that plaintiffs' state law overtime claims will be similarly impacted. *See, e.g., Franklin v. Breton Int'l, Inc.*, 2006 WL 3591949 at *4 (S.D.N.Y.2006) (holding that because plaintiff therein was "an exempt employee under the FLSA, he [was] also exempt under the overtime requirements of the New York" law).

Consequently, if the motion to intervene were granted, plaintiffs and the other class members are likely to be significantly prejudiced by having to either litigate their overtime claims, or attempt to negotiate a new settlement thereof, in the context of the Department of Labor's recent Opinion Letter.

Accordingly, the Court finds the prejudice resulting to other class members if D'Aria were permitted to intervene weighs against a finding that D'Aria's motion to intervene is timely.

c. Third Factor

The Court next turns to the third factor in the timeliness analysis, "the reason for and length of the delay." *See Alisal*, 370 F.3d at 921.

D'Aria submits no evidence with respect to the reason he did not seek to intervene before the deadline had passed for class members to object to the proposed settlement. D'Aria attests only that when he learned Kaufmann had withdrawn, he authorized counsel "to challenge the adequacy of the settlements on [D'Aria's] behalf and to put him forward in place of" Kaufmann. (*See* D'Aria Decl. ¶ 4.) In his motion to intervene, D'Aria argues that UBS and Kaufmann deliberately delayed providing notification of Kaufmann's withdrawal of his motion to intervene until it was too late for other class members to file their own objections to the proposed settlement. D'Aria relies on Kaufmann's declaration, in which Kaufmann states he reached a settlement with UBS on November 7, 2006, a week before Kaufmann provided notice to the Court of such settlement. (*See* Kaufmann Decl., filed November 15, 2006, ¶ 5.) There is no evidence, however, that UBS conspired with Kaufmann to delay announcement of Kaufmann's withdrawal of his motion.

Moreover, D'Aria submits no evidence that he relied on Kaufmann to object on his behalf, or that he would have filed his own objection had Kaufmann not moved to intervene. In any event, nothing precluded D'Aria from filing his own timely objection to the proposed

settlement. Indeed, other class members filed timely objections. Accordingly, the Court finds D'Aria has failed to provide adequate justification for his delay in seeking to intervene.

With respect to the length of the delay, as noted, D'Aria delayed for nearly three months after receiving notice of the settlement, as well as close to a month after the deadline for class members to object to the proposed settlement had passed. "A class member must intervene when he knows or has reason to know that his interests might be adversely affected by the outcome of the litigation." *Alisal*, 370 F.3d at 923.

Here, D'Aria knew of the settlement, consulted with counsel, and nonetheless failed to object to the settlement in a timely manner. The Class Notice clearly set forth November 14, 2006 as the deadline for submission of objections to the settlement, and expressly provided that any class member who failed to object in the manner set forth in the Class Notice would be "deemed to have waived any objections and [would] be foreclosed from making any objection." (*See* Class Notice at 7 ¶ C.) D'Aria thus was aware that by failing to object in a timely manner, he was forgoing an opportunity to object to the settlement. D'Aria has offered no adequate support for an order permitting him to evade that deadline by submitting untimely objections to the settlement in the form of a motion to intervene.

Accordingly, the Court finds "the reason for and length of the delay" in seeking intervention weighs against a finding of timeliness.

d. Conclusion

For the reasons set forth above, the Court finds D'Aria's motion to intervene is untimely and, consequently, that D'Aria has not shown he is entitled to intervene as a matter of right. *See Alisal*, 370 F.3d at 919 (holding "party seeking to intervene bears the burden of showing that *all* the requirements for intervention have been met") (emphasis in original).

4. Adequacy of Representation

Although D'Aria's motion for intervention as a matter of right fails because he has not demonstrated such motion is timely, the Court nonetheless will continue its analysis of the four-factor test.

The fourth and final factor is whether "the existing parties may not adequately represent the applicant's interest." *See Alisal*, 370 F.3d at 919. In determining adequacy of representation, the Court considers three factors: "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).

"The most important factor in determining the adequacy of representation is how the interest compares with the interest of existing parties." *Id.* "When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises." *Id.* "If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation." *Id.*

Here, D'Aria and the named *Glass* plaintiffs have the same ultimate objective: obtaining compensation for assertedly unpaid overtime and improper wage deductions. Indeed, D'Aria, in his proposed complaint-in-intervention, expressly adopts "all of the allegations of plaintiffs' complaint in this action except those that relate to the adequacy of the putative class representatives," and alleges no additional substantive causes of action against defendants. (*See* Proposed Complaint in Intervention ¶ 3.) Thus, D'Aria must make a "compelling showing" of inadequate representation. *See Arakaki*, 324 F.3d at 1086; *see also League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1306 (9th Cir.1997) ("When a proposed intervenor has not alleged any substantive disagreement between it and the existing parties to the suit, and instead has vested its claim for intervention entirely upon a disagreement over litigation strategy or legal tactics, courts have been hesitant to accord the applicant full-party status.").

D'Aria argues class counsel is inadequate for the following reasons: (1) the dollar amount of the settlement

is too low compared to the actual damages suffered by the class; (2) each class member in the instant action will receive significantly less than the recovery per class member in *Bowman;* (3) the instant action was settled without any formal discovery, expert analysis, or other formal litigation activity; (4) the attorneys' fees negotiated are too high compared to the time and effort expended; (5) the settlement was negotiated as a "claims made" settlement under which all unclaimed settlement funds and any portion of the claimed attorneys' fees that are not approved by the Court will revert to UBS; and (6) proper notice was not provided to the class. (*See* Motion at 2-3.) In essence, D'Aria complains that the amount of the settlement is too small, the amount of attorneys' fees sought is too large, and the circulation of the notice was too narrow.

In asserting the amount of the settlement is inadequate, D'Aria sets forth no analysis with respect to the likelihood of success on the merits of the class claims if such claims were tried rather than settled. *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.1998) (providing district court must consider, *inter alia,* "the strength of the plaintiffs' case" in determining whether a settlement is fair, reasonable, and adequate). Although D'Aria contends the *Glass* plaintiffs suffered between $240 million and $880 million in unpaid overtime,[2] he provides no analysis of the

2. The parties estimate the losses at approximately $128 million to $180 million. (*See* New York Attorney General Decl. Ex. 1 (Transcript of Aug. 11, 2006 preliminary approval hearing) at 13:1-14:5.)

applicability to the class members of the FLSA's administrative exemption. As discussed above, the Department of Labor recently issued an Opinion Letter stating the administrative exemption applies to stockbrokers and, consequently, that stockbrokers are not entitled to overtime pay under the FLSA. Because the reasonableness of the settlement depends not only on the claimed amount of damages, but also on a showing of the strength of the plaintiffs' case, and D'Aria fails to provide any analysis on the latter point, his computation of damages fails to provide adequate support for a finding that the amount of the settlement is inadequate.[3]

D'Aria's next contention is that the amount of the settlement is too low when compared with the settlement in *Bowman*. There is no evidence, however, that the *Bowman* and *Glass* settlements constitute parts of a single settlement, let alone a single settlement pursuant to which settlements funds were allocated to the *Bowman* class at the expense of the *Glass* class members. As the Court noted at the *Bowman* fairness hearing, the *Bowman* action was settled prior to the filing of any of the actions that ultimately were consolidated in the *Glass* action, and the amount of the

3. D'Aria's contention that plaintiffs' counsel did too little to prepare for settlement negotiations adds no further support in the absence of a showing that the settlement amount is inadequate. Consequently, the Court denies as moot defendants' motion, filed January 11, 2007, to strike the supplemental declaration of John Halebian as conclusory, in that the opinions challenged thereby concern the subject of adequate preparation.

Bowman settlement was unaffected in any way by the later settlement negotiations in the *Glass* action. (*See* McInerney Decl. Ex. 3 (Transcript of Nov. 17, 2006 *Bowman* fairness hearing) at 12:6-24.)

Moreover, D'Aria fails to set forth any independent analysis of the *Glass* class members' likelihood of success on the merits of their claims as compared to that of the *Bowman* plaintiffs. Rather, D'Aria relies entirely on the analysis set forth in the amicus brief submitted by the Attorney General of the State of New York, in which the Attorney General compared the California law applicable to the *Bowman* plaintiffs with the New York law applicable to the New York class members in the instant action. When UBS filed a detailed response to the amicus brief, explaining the differences between the two states' laws, the Attorney General filed a reply conceding California's overtime laws are significantly more favorable to plaintiffs than New York's overtime laws. D'Aria presents no argument to the contrary.

In arguing the amount of attorneys' fees negotiated reflects inadequate representation, D'Aria fails to recognize that the Ninth Circuit has held 25% of the gross settlement amount to be the benchmark for attorneys' fees awarded under the percentage method. *See, e.g., Powers v. Eichen*, 229 F.3d 1249, 1256-57 (9th Cir. 2000). Here, the settlement provides for a maximum fee of $11,250,000, which is 25% of the $45 million settlement amount. (*See* Amended Joint Stipulation of Settlement ¶ 29(a).) Moreover, the Ninth Circuit has held that where, as here, the settlement provides that

unclaimed settlement funds revert to the defendant, the district court must award fees as a percentage of the entire fund, or pursuant to the lodestar method, not on the basis of the amount of the fund actually claimed by the class. *See Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997). Consequently, D'Aria has failed to show counsel's claim for a 25% fee award indicates either some impropriety or inadequacy in counsel's representation.[4]

The Court likewise finds unpersuasive D'Aria's contention that plaintiffs' counsel inadequately represented the class by agreeing to a settlement under which any unclaimed settlement funds, or the amount by which attorneys' fees are reduced, will revert to UBS. D'Aria cites no authority holding improper a settlement providing for such reversion of unclaimed or unawarded funds; indeed, there is authority suggesting to the contrary. *See, e.g., Williams*, 129 F.3d at 1027 (discussing class action settlement without expressing concern as to provision for reversion of unclaimed funds to defendant); *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 816 (5th Cir. 1989) (approving settlement containing provision that unclaimed funds under consent decree would be divided between plaintiffs' counsel and defendant); Herbert Newberg & Alba Conte, 3 Newberg on Class Actions §§ 10:15, 10:17 (4th ed.2002) (citing cases).[5]

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4. The Court, of course, ultimately will determine whether the amount claimed should be awarded.

5. *See also Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990) (holding unclaimed (Cont'd)

Finally, with respect to notice, D'Aria argues that plaintiffs' counsel "failed to give proper notice to the class by misrepresenting the nature and amount of the proposed settlement, limiting actual notice solely to the last known address of class members, and failing to publish any notice in a widely circulated financial publication likely to be seen by class members." (*See* Motion to Intervene at 3:19-22.) D'Aria does not identify the asserted misrepresentations, and the Court is aware of none. Nor does D'Aria submit evidence supporting his assertion as to the use of addresses. By contrast, plaintiffs' counsel attests "notice was not limited to the last known address of class members; instead, the claims administrator did address updated searches and re-mails." (*See* McInerney Decl. ¶ 14; *see also* Holland Decl. ¶¶ 8-9.) Finally, plaintiffs' counsel attests he "took out a full page advertisement in the Registered Rep," which, he further attests, is a "monthly national publication subscribed to by a large number of brokerage houses, branches and brokers themselves." (*See id.* ¶ 15 and Ex. 10.) D'Aria submits no evidence to the contrary. Consequently, D'Aria has not shown the notice provided to the class was inadequate.

(Cont'd)
amount of class action *judgment* against defendant may be returned to defendant "when deterrence is not a goal of the statute or is not required by the circumstances"); *In re Microsoft I-V Cases*, 135 Cal.App.4th 706, 721, 37 Cal.Rptr.3d 660 (2006) (noting, under California law, "a court approved settlement could properly include a 'reversion of . . . funds to the defendant,' such as the one-third reversion" of unclaimed settlement funds provided for in settlement therein) (citation omitted; ellipsis in original).

In sum, D'Aria has failed to demonstrate he "would offer any necessary elements to the proceeding that other parties would neglect." *See Arakaki*, 324 F.3d at 1086.

Accordingly, for the reasons set forth above, D'Aria has not shown, let alone made a "compelling showing" of, *see Arakaki*, 324 F.3d at 1086, inadequate representation. Consequently, even if his motion to intervene had been timely, said motion, for this additional reason, will be denied.[6]

CONCLUSION

For the reasons set forth above, D'Aria's motion to intervene in the instant action is hereby DENIED.

This order terminates Docket No. 130.

IT IS SO ORDERED.

Dated: January 17, 2007

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

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6. In light of this ruling, the Court does not reach plaintiffs' argument that D'Aria's counsel engaged in unethical conduct by criticizing the manner in which Kaufmann, his former client, withdrew his motion to intervene in the instant action.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED NOVEMBER 16, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

No. C-04-3525 MMC

JEFF BOWMAN, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC.,

Defendant.

No. C-06-4068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

v.

UBS FINANCIAL SERVICES, INC., et al.,

Defendants.

Appendix D

ORDER DENYING ANTHONY DARIA'S MOTION TO JOIN OR BE SUBSTITUTED FOR LAWRENCE R. KAUFMANN AS (1) OBJECTOR TO PROPOSED SETTLEMENT AND (2) MOVANT AND INTERVENOR-PLAINTIFF IN MOTION TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF

Before the Court is "Anthony Daria's Motion To Join Or Be Substituted For Lawrence R. Kaufmann As (1) Objector To Proposed Settlement And (2) Movant And Intervenor-Plaintiff In Motion To Intervene, For Consolidation, & For Other Relief," filed November 16, 2006.

In a letter and declaration filed November 15, 2006, Kaufman withdrew his objection to the proposed settlement in *Bowman*. By separate order filed concurrently herewith, the Court has found approval for such withdrawal is not necessary, as Kaufmann is not a member of the *Bowman* class and thus lacks standing to assert any objection to the *Bowman* settlement. Daria cites no authority permitting him to join or substitute in another person's objection and thus avoid any argument that Daria's objection is untimely, much less any authority permitting him to join or substitute himself in place of a person who has withdrawn an objection. Moreover, Daria, like Kaufmann, is not a member of the *Bowman* class and, thus, lacks standing to object to the proposed *Bowman*

settlement.[1] Accordingly, Daria's motion to join in Kaufmann's withdrawn objection, or to substitute himself in place of Kaufmann for purposes of asserting Kaufmann's withdrawn objection, is hereby DENIED.

By the instant motion, Daria further seeks to join or substitute as the movant in Kaufmann's withdrawn motions to intervene in the *Bowman* and *Glass* actions. Daria cites no authority permitting him to join or substitute himself as the movant for purposes of asserting another person's motion to intervene. Moreover, because Kaufmann has withdrawn his motions to intervene, there are no motions pending in which Daria can "join" or "substitute." Accordingly, Daria's motion to join in Kaufmann's motions to intervene, or to substitute himself in place of Kaufmann for purposes of making such motions, is hereby DENIED.

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1. The *Bowman* action is asserted on behalf of a class consisting of all persons who, between June 30, 2000 and the present, worked for UBS as a Financial Advisor or Financial Advisor Trainee in California. (*See* Second Amended Complaint ("SAC") ¶ 6.) Daria's counsel attests Daria was employed by UBS as a broker in New York. (*See* Halebian Decl. ¶ 2.) "The plain language of Rule 23(e) clearly contemplates allowing only class members to object to settlement proposals." *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989). Consequently, "non-class members have no standing to object, pursuant to a Rule 23(e) notice directed to class members, to a proposed class settlement." *See id.*; *see also San Francisco NAACP v. San Francisco Unified School District*, 59 F. Supp. 2d 1021, 1032 (N.D. Cal. 1999) (holding "nonclass members have no standing to object to the settlement of a class action").

Appendix D

This order terminates Docket No. 136 in Case No. 04-3525 and Docket No. 86 in Case No. 06-4068.

IT IS SO ORDERED.

Dated: November 16, 2006

s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITIONS FOR REHEARING FILED MAY 18, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-15278

D.C. No. CV-06-04068-MMC
Northern District of California, San Francisco

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation,

Defendants - Appellees,

v.

ANTHONY D'ARIA,

Plaintiff-intervenor - Appellant.

Appendix E

No. 07-15309

D.C. No. CV-06-04068-MMC
Northern District of California, San Francisco

JOSEPH GLASS; DANTE DIFRANCESCO; RALPH CARBONE; DAVID BACHRACH, individually and on behalf of all others similarly situated,

Plaintiffs,

and

MARTY EVANS,

Plaintiff - Appellant,

v.

UBS FINANCIAL SERVICES, INC., a corporation; UBS PAINE WEBBER, a corporation; PAINE WEBBER GROUP, INC., a corporation,

Defendants - Appellees,

v.

ANTHONY D'ARIA,

Plaintiff-intervenor.

Appendix E

ORDER

Before: FARRIS, NOONAN and McKEOWN, Circuit Judges.

The panel has issued an amended memorandum disposition. Accordingly, the petitions for rehearing are DENIED.

The full court has been advised of the Petitions for Rehearing En Banc and no judge of the court has requested a vote on the Petitions for Rehearing En Banc. Fed. R. App. P. 35. Appellants' Petitions for Rehearing En Banc are DENIED.

No further petitions for rehearing and petitions for rehearing en banc will be entertained.